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JABATAN PENDAFTARAN NEGARA & ORS v. SEORANG KANAK-KANAK & ORS; MAJLIS AGAMA ISLAM NEGERI JOHOR (INTERVENER)

FEDERAL COURT, PUTRAJAYA
ROHANA YUSUF PCA
B AZAHAR MOHAMED CJ (MALAYA)
DAVID WONG DAK WAH CJ (SABAH & SARAWAK)
MOHD ZAWAWI SALLEH FCJ
ABANG ISKANDAR FCJ
IDRUS HARUN FCJ
C NALLINI PATHMANATHAN FCJ
[CIVIL APPEAL NO: 01(f)-43-09-2017(W)]
13 FEBRUARY 2020

ADMINISTRATIVE LAW: *Judicial review – Challenge against decision of*
D *Director General of National Registration ('DGNR') – Application by Malay Muslim illegitimate child – Application to enter name of father of child in child's Birth Register – DGNR issued child's birth certificate and entered child's full name with 'bin Abdullah' instead of 'bin' father's name – Application to correct child's name from 'bin Abdullah' to 'bin' father's name dismissed by DGNR – Whether*
E *DGNR's refusal to correct or alter particulars 'bin Abdullah' to be substituted with 'bin' father's name in Birth Register made in accordance with law – Whether s. 13A of Births and Deaths Registration Act 1957 ('BDRA') applies to registration of births of Muslim children – Whether enabling child to be named with personal name of person acknowledged to be father of child – Whether 'surname' in s. 13A of BDRA*
F *includes patronymic surnames – Whether Malays have surnames*

CONSTITUTIONAL LAW: *Fundamental liberties – Personal liberty – Challenge against decision of Director General of National Registration ('DGNR') – Application by Malay Muslim illegitimate child – Application to enter name of father of child in child's Birth Register – DGNR issued child's birth certificate and*
G *entered child's full name with 'bin Abdullah' instead of 'bin' father's name – Child's birth certificate contained notation 'Permohonan Seksyen 13' as acknowledgment of registration of birth for illegitimate child – Whether entry of 'bin Abdullah' and notation 'Permohonan Seksyen 13' in child's birth certificate infringed child's fundamental liberties*

H ***ISLAMIC LAW:*** *Legislation – Islamic law of State – Challenge against decision of Director General of National Registration ('DGNR') – Application by Malay Muslim illegitimate child – Application to enter name of father of child in child's Birth Register – DGNR issued child's birth certificate and entered child's full name with 'bin Abdullah' instead of 'bin' father's name – Child's birth certificate*
I *contained notation 'Permohonan Seksyen 13' as acknowledgment of registration of birth for illegitimate child – DGNR relied on fatwa by National Fatwa Committee ('NFC') in arriving at decision – Whether, in performing registration of births of Muslim children, Registrar of Births and Deaths may refer to and rely on sources*

of Islamic law on legitimacy – Whether DGNR could rely on fatwa by NFC when child is subjected to Islamic laws of State – Whether illegitimate Muslim child could be ascribed to name of father in Islam – Islamic Family Law (State of Johor) Enactment 2003, ss. 52 & 111

The second ('MEMK') and third ('NAW') respondents, both Muslims, were married on 24 October 2009 and less than six *qamariah* months later, the first respondent ('child') was born, making him an illegitimate child under Muslim law. The child's birth was registered two years later, pursuant to ss. 12(1) and 13 of the Births and Deaths Registration Act 1957 ('BDRA'). In the application, the parents jointly sought to have MEMK's name entered in the Birth Register as the father of the child. The Director General of National Registration ('DGNR') issued the child's birth certificate and, in compliance with s. 13 of the BDRA, entered MEMK's name as the child's father but the child's full name was 'bin Abdullah' instead of 'bin MEMK'. The child's birth certificate further contained a notation 'Permohonan Seksyen 13', an explicit acknowledgment that the application for the registration of the birth was for an illegitimate child. MEMK applied, under s. 27(3) of the BDRA, to correct the child's name from 'bin Abdullah' to 'bin MEMK'. The DGNR rejected the application on the basis that, (i) the child being an illegitimate, could not be ascribed to the name of his biological father, MEMK; and (ii) the child was to be named 'bin Abdullah', in line with the *fatwa* issued on the subject ('DGNR's decision'). The respondents challenged the DGNR's decision, by way of a judicial review at the High Court, seeking various declarations and reliefs, namely: (i) declarations that (a) the discriminatory decisions by the appellants against the illegitimate status of the child was against the law; (b) the insertion of the entry 'Permohonan Seksyen 13' in the child's birth certificate was null and void and in violation of the child's right; and (c) the DGNR's decision was against the law; (ii) a *certiorari* to quash the DGNR's decision; and (iii) a *mandamus* to compel the DGNR to (a) remove the entry 'Permohonan Seksyen 13' from the child's birth certificate; (b) alter the child's birth certificate from 'bin Abdullah' to 'bin MEMK'; (c) alter the father's and mother's record accordingly; and (d) refer the child's father as MEMK and not 'Abdullah'. The High Court dismissed the respondents' application on the grounds that the (i) the DGNR's refusal to alter the child's name, from 'bin Abdullah' to 'bin MEMK', was in accordance with law; (ii) the entry 'Permohonan Seksyen 13' in the child's birth certificate did not violate any of the child's fundamental constitutional liberties; and (iii) the DGNR was not wrong to rely on Islamic law on legitimacy in rejecting the application to amend the child's full name as 'bin MEMK'.

Upon appeal, the Court of Appeal reversed the decision of the High Court on the grounds that (i) the High Court failed to address the existence of s. 13A(2) of the BDRA in arriving at its decision. The language of s. 13A(2), read together with s. 27(3) of the BDRA, enables an illegitimate child to bear either the mother's or father's name. The DGNR was wrong in dismissing

the respondents' application; (ii) the BDRA makes no distinction between a Muslim and non-Muslim child, hence s. 13A(2) does not prescribe a different treatment for illegitimate Muslim children. Section 13A(2) of the BDRA did not require an illegitimate Muslim child to bear the father's name as 'bin Abdullah; (iii) since the father's name had already been entered in the birth certificate, there would be no further necessity to register the child's name as 'bin Abdullah'; (iv) it was not the duty and function of the DGNR, under the BDRA, to insert the notation 'Permohonan Seksyen 13' on the child's birth certificate to assist relevant agencies in dealing with the issues of inheritance, maintenance, *wali*, marriage, death, citizenship, lineage *etc*. The issues could be settled without the need to make the 'Permohonan Seksyen 13' on the child's birth certificate; (v) since the procedure for the registration of an illegitimate child was spelt out clearly and formally in s. 13A(2) of the BDRA, the DGNR should be guided by the said section, and not a *fatwa,* in considering the respondents' application; the bases relied upon by the DGNR, on the *fatwa* by the National Fatwa Committee ('NFC'), were erroneous as the *fatwa* bore no relevance to the DGNR's statutory duty under the BDRA. A *fatwa* did not have the force of law and, even if it did (after being made pursuant to State law), it could not supersede the BDRA, a Federal law; and (vi) there was nothing in the BDRA that allowed for the importation of substantive principles of Islamic law in the registration process. The impugned decision was a purely administrative function that had nothing to do with Islamic jurisprudence on legitimacy. The duty of the DGNR was to follow the procedure laid down in s. 13A(2) of the BDRA and to allow applications which comply with the necessary requirements under that provision. Hence, the present appeal. The questions that arose were (i) whether s. 13A of the BDRA applies to the registration of births of Muslim children, enabling the children to be named with the personal name of a person acknowledging to be the father of the children; (ii) whether, in performing registration of births of Muslim children, the Registrar of Births and Deaths may refer to and rely on sources of Islamic law on legitimacy; and (iii) whether the civil court may determine questions or matters on the legitimacy of Muslim children in respect of naming and ascription of paternity.

Held (allowing appeal in part)
Per Rohana Yusuf PCA, Azahar Mohamed CJ (Malaya), Mohd Zawawi Salleh and Idrus Harun FCJJ (for the majority):

(1) Section 13A of the BDRA deals strictly with 'surname' and provides for a situation where additional information may be inserted in the Register. Following s. 13A(1) of the BDRA, in respect of a legitimate child, ordinarily the surname of the father may be entered. In the case of an illegitimate child, s. 13A(2) of the BDRA provides that a mother's surname may be inserted where the mother is the informant and that she volunteers the information. However, if a person who acknowledges to be the father in accordance with s. 13 of the BDRA so requests, his surname may be inserted. (paras 23 & 24)

(2) Section 13A(2) of the BDRA is an extension of s. 13, which allows additional information to be entered in the Birth Register of an illegitimate child. That additional information is the surname, if any, of the mother or the father of the child. Given its plain meaning, s. 13A is not a mandatory provision to be applied to all cases. Its application is only relevant to a person who carries a surname, hence the word 'if any' in the law. The section too contemplates cases where a person to be registered does not carry a surname. It does not discriminate between Muslim or non-Muslim. It only discriminates between people with surname with one who has none. (paras 25 & 26)

(3) The term 'surname' is not defined under the BDRA. Based on plain dictionary meaning, there is a difference between a personal name and a surname. In the present case, MEMK could not be a personal name and a family name at the same time. It is not a family name, a hereditary name or an inherited name commonly shared by, for example, the wife and all members of the family. As generally understood, the word 'bin' or 'binti' in the Malay naming culture means the son or daughter of someone. In other words, 'bin' or 'binti' is attributed to a person's personal name and not a family name. The Legislature does not legislate 'surname' in vain. Section 13A of the BDRA is intended to allow a surname as an additional information to be added in the Birth Register and birth certificate. Naturally, if someone has no surname, s. 13A could not be applied to him. (paras 27-29)

(4) The surname of the child was never an issue before the DGNR. The Court of Appeal, in construing s. 13A of the BDRA, failed to appreciate that there was a difference between a personal name and a surname. 'MEMK' was obviously not a family name, a hereditary name or an inherited name commonly shared by, for example, the wife and all members of the family. Instead, it was his personal name. (paras 30 & 31)

(5) Malays do not have any surname. To name the child as 'bin MEMK' on the basis that it was a surname of the father, pursuant to s. 13A of the BDRA, was without basis legally or factually. Section 13A of the BDRA is clear in its language and does not call for any other rule of statutory interpretation, purposive or golden rule. Section 13A of the BDRA is not applicable to the Malays in Malaysia, and does not apply to registration of births of Malay Muslim children. It does not enable the children to be named with the personal name of a person acknowledging to be the father because the personal name of the father is not a surname. The DGNR was correct in law not to allow the application to name the child as 'bin MEMK'. That part of the DGNR's decision did not call for judicial interference. (paras 43, 44, 47 & 48)

(6) The Federal Constitution ('FC') and the background of the Malaysian legal history have always accepted that Muslims in this country are subjected to the general law enacted by Parliament as well as State's Islamic laws enacted by the Legislature of each State. These constitutional arrangements are clearly stipulated in the various provisions of the FC. Article 74(2) gives the Legislature of a State in Malaysia the authority to make laws on the matters stated in List II (State List) in the Ninth Schedule of the FC. The legitimacy of a Muslim person is one of the areas in which the State Legislature is authorised by the FC to enact State law. In fact, the FC has explicitly and expressly ousted the legislative competence of Parliament to legislate in respect of legitimacy for Muslims. (paras 51 & 52)

(7) An illegitimate Muslim child could not be ascribed to the name of his father in Islam and this is made manifest when almost every legislation on the subject in the Enactment of each States of Malaysia contains this clear injunction. MEMK and NAW were Muslims who married under the Islamic laws and the birth of the child occurred in Johor. Therefore, they were subjected to Islamic laws as found in the State of Johor, namely s. 111 of the Islamic Family Law (State of Johor) Enactment 2003 ('Enactment'), and the said Enactment is clear on that prohibition. (paras 57 & 58)

(8) The DGNR correctly rejected the respondents' application for the child to be ascribed to him as 'bin MEMK' not only due to the non-application of s. 13A of the BDRA but he also took into account the written law applicable to the respondents in the State legislation. It could not be said that the DGNR, in rejecting the application of the respondents, was unreasonable. His decision not to allow the child's full name as '... bin MEMK' was clearly substantiated by the law applicable to the respondents. Furthermore, such written law was not inconsistent with any of the provisions in the BDRA. The DGNR also acted reasonably in referring to Islamic law in performing the registration of birth of an illegitimate Muslim child. The DGNR's decision in refusing to ascribe the father's name, MEMK, to the child was in compliance with the law and was not tainted with illegality, irrationality or procedural impropriety. (paras 60, 66 & 69)

(9) In performing registration of births of Muslim children, the DGNR may rely on Islamic law applicable to the person. The national level *fatwa* body's stand was that illegitimate children have to be named 'bin Abdullah' or 'binti Abdullah' regardless of whether his birth was followed by his parents' marriage. As no *fatwa* on how to name an illegitimate child is gazetted in Johor, the DGNR could not impose the *fatwa* of the NFC on the respondents. The national *fatwa* could only apply to the State of Johor by virtue of s. 52(1) of the Enactment. In imposing the *fatwa* of the NFC, without adhering to s. 52 of the

Enactment, the DGNR had usurped the power or the authority given to the Fatwa Committee of Johor in the imposition of 'bin Abdullah' on the child. The DGNR's act was also inconsistent with s. 47 of the Enactment as only the Sultan of Johor must assent to the publication of a *fatwa.* Since the Fatwa Committee of Johor had not adopted this *fatwa* of the NFC, it was not for the DGNR to decide that the *fatwa* of the NFC was the one applicable to the respondents. The DGNR had no basis in law to impose the naming of 'bin Abdullah' in this case and such a decision of the DGNR was subject to be impugned. (paras 82, 84, 85 & 86)

(10) The notation 'Permohonan Seksyen 13' could not be held to be discriminating as it was a true reflection of the fact surrounding the registration of birth of the child. The appellant's appeal was allowed in part and the orders of the Court of Appeal were set aside. The DGNR was ordered to remove 'bin Abdullah' from the birth certificate of the child. The name of the child without 'bin Abdullah' shall so remain, in line with the application made by the respondents. (paras 89 & 90)

David Wong Dak Wah CJ (Sabah & Sarawak) (dissenting):

(1) With the exception of *ie* the Chinese race, a vast majority of Malaysians, including Muslims, do not have 'surnames'. Reading 'surname' to include 'patronymic surnames' would be in accord with the object and purpose of the BDRA. Its long title stipulates that the BDRA is an Act 'relating to the registration of births and deaths'. It would hardly accord with logic to read the word 'surname' in a restrictive manner and to deny a vast majority of Malaysians a surname if that phrase includes 'patronymic surnames'. Reading ss. 13 and 13A of the BDRA together, a father of an illegitimate child who wishes to have his son or daughter carry his surname is certainly not precluded from having that done by the language of the BDRA. (paras 125, 126 & 131)

(2) Section 13 of the BDRA, which is the only other provision on illegitimate children, and which only deals with the registration of the father's name in the birth certificate, is alone insufficient to determine what the 'full name' of the child should be. Accordingly, s. 13 of the BDRA has to be read together with s. 13A(2) to determine how the child should be named. 'Surname', under s. 13A of the BDRA was intended to include patronymic surnames and s. 13A was intended to apply to all illegitimate children – Muslims or otherwise. As there is no other provision in the BDRA which supports the appellants' reliance on the 'bin Abdullah' convention and based on the non-discriminatory nature of BDRA, there could not be any reasonable suggestion that the illegitimate children of Muslims may be ascribed any surname other than their biological father's. The appellants acted in contravention of the clear provisions of s. 13A of the BDRA when the respondents' application under s. 27(3) of the BDRA was rejected. (paras 140, 142 & 143)

(3) The appellants had no jurisdiction to apply Islamic law as far as the registration of births and deaths in the context of item 12(a) of the Federal List is concerned. The registration of births and deaths is a subject matter falling exclusively within the Federal List without any necessary correlation to the State List. This was without prejudice to the legal concept of legitimacy. The legitimacy of Muslims is a subject-matter falling strictly within the jurisdiction of the State List. Paternity and legitimacy are separate and distinct concepts and the mere registration of the father's surname does not render legitimate an otherwise illegitimate child. Having registered MEMK as the father, there was no rational justification in the provisions of the BDRA for the appellants to ascribe to him the surname 'bin Abdullah' over the patronymic surname 'bin MEMK'. The drafters of our FC purposely chose to draft it in such terms and such a way so as to draw an express demarcation between the registration of births and deaths on the one side, and the determination of legitimacy on the other. In the result, the obvious conclusion was that the appellants were and are required to apply the provisions of the BDRA as it exists. The appellants' decision was purely untenable and unsustainable in law. (paras 183, 184 & 188-190)

(4) There was no legal basis for the appellants to refer to Islamic law and legal principles as they comprise Federal bodies established under the Federal law, and whose powers are circumscribed by the Federal List. The appellants' reliance on the 'bin Abdullah' convention was not countenanced by law and was an error which must be corrected. (para 192)

(5) The Court of Appeal noted that the operative word of s. 27(3) of the BDRA is 'may'. Decided case laws have held that 'may' generally confers discretionary power. The Court of Appeal then went on to note that s. 13A(2) of the BDRA grants MEMK the ability to have his surname used in respect of his illegitimate son, the child. It further held that it was not within the power of the appellants to arbitrarily elect the surname 'bin Abdullah' over 'bin MEMK'. The judgment of the Court of Appeal was entirely correct. While the word 'may' confers discretion, it is a cardinal principle of administrative law that discretion may not be absolute nor may it be applied or refused to be applied at the whims and fancies of the decision-maker. Discretion must be exercised in accordance with law, leaving aside all irrelevant considerations while taking into account all relevant considerations. The appellants were only entitled to exercise their discretion in s. 27(3) of the BDRA discretion one way; to correct the mistake as per the respondents' application. (paras 193 & 194)

(6) There was no conceivable reason why the status of an illegitimate child needed to be broadcasted to all and sundry. The birth certificate is a significant document and features in many important dealings with the Government and private persons. What useful purpose does displaying one's illegitimate status serve? It would lead to serious and unjust repercussions to any child's emotional well-being and future. The child is not responsible for the circumstances he or she finds himself or herself in and, when the law allows the child to bear such stigma, it is a law which does not have the best interest of the child. The best interest of children must be the primary concern in all laws, policies and decisions affecting them. Their right to be known as a member of the family should not be taken away. This is not an emotional argument but a due recognition that such rights are constitutional rights. (paras 202-204)

(7) The Court of Appeal arrived at the correct conclusion by ordering the removal of the s. 13 endorsement. There was no credible reason to depart from the decision and reasons of the Court of Appeal. The appeal was dismissed and all the orders of the Court of Appeal were affirmed. (paras 205 & 214)

Nallini Pathmanathan & Abang Iskandar Abang Hashim FCJJ (dissenting):

(1) The BDRA is enacted pursuant to item 12, of the Federal List in the Ninth Schedule, which item relates to census and statistics in the nation. It is applicable to all persons in the country, regardless of race and religion. No differentiation is made in the applicability of the provisions of the BDRA to the various races who comprise the citizens of this plural population comprising Malaysia. Neither does the BDRA relate to, provide for, or prescribe stipulations in relation to legitimacy, naming conventions, cultural practices or religious law. In other words, the BDRA is an entirely secular Act. (paras 244 & 245)

(2) The meaning of 'surname' is a question of law because it requires statutory interpretation. The view of experts on the subject was entirely irrelevant. None of the experts presented an opinion in relation to the statutory interpretation of 'surname' in the context of the BDRA. The experts did not address the issue of whether 'surname' would include patronymic surnames, particularly in the context of the BDRA. The purpose of the BDRA is to provide a full repository or register of births within the country. An essential feature of that register is that the identity of the mother and father, meaning the biological mother and father, is recorded. This affords a child an identity. In the context of the child, the paternity of the father was certainly not in issue. For the purposes of registering his birth and identification of his biological parents, the child ought to be ascribed the name of his biological father as that was a fact that was not in dispute. (paras 243, 246 & 247)

(3) Applying the purposive approach, it followed that the object of s. 13A of the BDRA is to enable or facilitate the entry of a father's name where a child is illegitimate. It allows paternity to be established for an illegitimate child where the father acknowledges paternity, and seeks and consents to have his name specified as the child's surname. In short, the section allows for a formal acknowledgement of paternity, for purposes of record in the Register of Births. Paternity provides information in relation to the identity of the biological father of a child. The BDRA is enacted to provide for a census of all citizens through a system of registration of births and deaths nationwide. As such is its object, the application of a purposive approach to statutory construction would yield the result that the term 'surname' in s. 13A ought to be construed as referring to both a patronymic name as well as the dictionary meaning of the word. (paras 250 & 251)

(4) The expert opinions relied upon in the majority judgment might well provide in essence that Malays have no surnames as understood in the traditional English language and culture sense. However, it did not follow that s. 13A of the BDRA became inapplicable to an entire segment of society or citizens in the nation. The more logical and reasonable conclusion which accords with a purposive approach to statutory interpretation would be to construe 'surname' in the context of the object of the BDRA, so as to mean the name of the father. The purpose of s. 13A is to enable an illegitimate child to have the name of his father added to his name so that the identity of the biological father is expressly stated. (para 253)

(5) Stating that Malays and/or Muslims do not have surnames is to render ss. 13A and 13 of the BDRA otiose. It suggests that Parliament only intended for such a provision relating to the 'full name' of children to apply to a specific category of Malaysians who have surnames as the term is traditionally understood. Such a construction would lead to the exclusion of a vast majority of the Malaysian populace. An interpretation along those restricted lines of 'surname' to exclude 'patronymic surnames', on the assumption that Muslims do not generally have surnames, also has the effect of excluding all other persons who are not Muslims and do not have surnames. Many races such as Malaysians of Indian descent or from Sabah and Sarawak do not have traditional surnames and indeed rely on patronymic surnames. Thus, such a constrained reading would bring about an incongruous result. As the BDRA makes no distinction in its application between Muslims or non-Muslims, and until and unless Parliament amends the law to this effect, ss. 13 and 13A of the BDRA apply to all persons. The appellants were under the legal obligation to ascribe to the child the name 'Child bin MEMK' representing the MEMK's personal name as a patronymic surname. (paras 260-262)

(6) The NFC is a Federal body and its *fatwas* do not have the force of law. If the NFC's *fatwas* are gazetted by the relevant State, then it applies as part of that State's law. However, the NFC's *fatwas* in this case have not been gazetted in Johor and even if they were, thereby becoming State law, that would, in any case, have no effect insofar as the interpretation and application of the BDRA was concerned. The intrinsic structure of the FC renders all Federal law promulgated for general Federal purposes secular. Islamic law can only be enacted by the State and have effect in that State over matters in respect of which it has jurisdiction.The appellants acted *ultra vires* the BDRA by referring to external sources of law when exercising their powers of registration under that law, which the Federal Constitution and the BDRA do not otherwise permit them to do. (paras 284 & 285)

(7) Making an order to include only the child's name without including the MEMK's name was not legally tenable. There is no legal authority to suggest that the patronymic surname 'bin Abdullah' is correct just as there is no authority to suggest that only the child's name alone should be reflected. To ascribe to him only his name without his father's name as his full name amount to an implicit recognition that State-promulgated Islamic law declaring him illegitimate applies. (para 292)

(8) The Court of Appeal took into account the correct legal principles, arrived at the correct conclusions, and made the correct orders. The appeal was dismissed in its entirety with no order as to costs. The decision of the Court of Appeal was affirmed. (para 295)

Bahasa Melayu *Headnotes*

Responden kedua ('MEMK') dan ketiga ('NAW'), kedua-duanya beragama Islam, berkahwin pada 24 Oktober 2009 dan kurang enam bulan *qamariah* kemudian, responden pertama ('kanak-kanak') dilahirkan, menjadikan dia anak luar nikah bawah undang-undang Islam. Kelahiran kanak-kanak tersebut didaftarkan dua tahun kemudian, bawah ss. 12(1) dan 13 Akta Pendaftaran Kelahiran dan Kematian 1957 ('APKK'). Dalam permohonan tersebut, ibu bapanya bersama-sama memohon agar nama MEMK direkodkan dalam Daftar Kelahiran sebagai bapa kanak-kanak tersebut. Ketua Pengarah Pendaftaran Negara ('KPPN') mengeluarkan sijil kelahiran kanak-kanak tersebut dan, mematuhi s. 13 APKK, merekodkan nama MEMK sebagai bapa kanak-kanak itu tetapi nama penuhnya diletakkan sebagai 'bin Abdullah' dan bukan 'bin MEMK'. Sijil kelahiran kanak-kanak tersebut seterusnya mengandungi catatan 'Permohonan Seksyen 13', iaitu satu pengiktirafan nyata bahawa permohonan pendaftaran kelahiran dibuat untuk seorang anak tidak sah taraf. MEMK memohon, bawah s. 27(3) APKK, untuk membetulkan nama kanak-kanak tersebut daripada 'bin Abdullah' menjadi 'bin MEMK'. KPPN menolak permohonan ini atas alasan (i) oleh kerana kanak-kanak tersebut tidak sah taraf, nama penuhnya tidak boleh mengandungi nama bapa kandungnya, MEMK; dan (ii) kanak-

kanak tersebut dinamakan 'bin Abdullah', selaras dengan *fatwa* yang dikeluarkan tentang perkara tersebut ('keputusan KPPN'). Responden-responden mencabar keputusan KPPN, melalui semakan kehakiman di Mahkamah Tinggi, memohon pelbagai pengisytiharan dan relief, khususnya: (i) pengisytiharan bahawa (a) keputusan perayu-perayu, yang mendiskriminasi status tidak sah taraf kanak-kanak tersebut, bertentangan dengan undang-undang; (b) kemasukan catatan 'Permohonan Seksyen 13' dalam sijil kelahiran kanak-kanak tersebut terbatal dan tidak sah serta mencabuli hak kanak-kanak tersebut; dan (c) keputusan KPPN bertentangan dengan undang-undang; (ii) *certiorari* demi membatalkan keputusan KPPN; dan (iii) *mandamus* untuk memaksa KPPN (a) memadam catatan 'Permohonan Seksyen 13' dalam sijil kelahiran kanak-kanak tersebut; (b) meminda sijil kelahiran kanak-kanak tersebut, daripada 'bin Abdullah' menjadi 'bin MEMK'; (c) meminda rekod ibu dan bapa kanak-kanak tersebut; dan (d) merujuk bapa kanak-kanak tersebut sebagai 'MEMK' dan bukan 'Abdullah'. Mahkamah Tinggi menolak permohonan responden-responden atas alasan (i) keengganan KPPN meminda nama kanak-kanak tersebut, daripada 'bin Abdullah' menjadi 'MEMK', selaras dengan undang-undang; (ii) entri 'Permohonan Seksyen 13' dalam sijil kelahiran kanak-kanak tersebut tidak mencabuli mana-mana hak kebebasan asasi berperlembagaan; dan (iii) KPPN tidak terkhilaf apabila bergantung pada undang-undang Islam tentang kesahan taraf dalam menolak permohonan untuk meminda nama penuh kanak-kanak tersebut menjadi 'bin MEMK'.

Susulan rayuan, Mahkamah Rayuan mengakas keputusan Mahkamah Tinggi atas alasan (i) Mahkamah Tinggi gagal menumpukan pada kewujudan s. 13A(2) APKK dalam mencapai keputusannya. Bahasa s. 13A(2), dibaca bersekali dengan s. 27(3) APKK, membolehkan seorang anak tidak sah taraf dibubuhkan nama ibu atau bapanya. KPPN terkhilaf dalam menolak permohonan responden-responden; (ii) APKK tidak membezakan antara seorang yang beragama Islam dan bukan Islam, maka s. 13A(2) tidak memperuntukkan layanan berbeza antara seorang kanak-kanak beragama Islam dan bukan Islam. Seksyen 13A(2) tidak mengkehendaki agar seorang kanak-kanak beragama Islam yang tidak sah taraf dibubuhkan 'bin Abdullah' sebagai nama bapanya; (iii) oleh kerana nama bapa kanak-kanak tersebut sudah direkodkan dalam sijil kelahiran, tiada keperluan lanjut untuk mendaftarkan namanya dengan 'bin Abdullah'; (ii) KPPN tidak bertanggungjawab dan berfungsi, bawah APKK, memasukkan catatan 'Permohonan Seksyen 13' dalam sijil kelahiran untuk membantu agensi-agensi relevan dalam berurusan dengan isu-isu pewarisan, nafkah, perwalian, perkahwinan, kematian, kewarganegaraan, nasab dan sebagainya. Isu-isu ini boleh diselesaikan tanpa keperluan mencatat 'Permohonan Seksyen 13' dalam sijil kelahiran kanak-kanak tersebut; (v) oleh kerana tatacara pendaftaran seorang anak tidak sah taraf diperuntukkan dengan jelas dan rasmi dalam s. 13A(2) APKK, KPPN seharusnya berpandukan seksyen ini, dan bukan *fatwa*, dalam mempertimbangkan permohonan responden-responden; asas yang menjadi sandaran KPPN, tentang *fatwa* oleh Majlis

Fatwa Kebangsaan ('MFK'), satu kekhilafan kerana *fatwa* tersebut tidak relevan dengan kewajipan statutori KPPN bawah APPK. Satu-satu *fatwa* tidak mempunyai kuat kuasa undang-undang dan, jika pun ada (selepas menjadi berkuat kuasa bawah undang-undang Negeri), ini tidak boleh menggantikan APKK, satu undang-undang Persekutuan; dan (vi) tiada mana-mana dalam APKK yang membenarkan cedokan prinsip-prinsip substantif dalam proses pendaftaran. Keputusan yang dipersoalkan satu fungsi pentadbiran semata-mata dan tiada kaitan dengan jurisprudens Islam tentang kesahan taraf. KPPN berkewajipan mematuhi tatacara yang digariskan dalam s. 13A(2) KPPN dan membenarkan permohonan-permohonan yang mematuhi syarat-syarat penting bawah peruntukan tersebut. Maka timbul rayuan ini. Soalan-soalan yang timbul adalah (i) sama ada s. 13A KPPN terpakai pada pendaftaran kelahiran kanak-kanak beragama Islam, membolehkan kanak-kanak ini dinamakan dengan nama peribadi seorang yang mengiktiraf dirinya bapa anak tersebut; (ii) sama ada, dalam mendaftar kelahiran kanak-kanak orang Islam, Pendaftar Kelahiran dan Kematian boleh merujuk dan bersandar pada sumber-sumber undang-undang Islam tentang kesahan taraf; dan (iii) sama ada mahkamah sivil boleh memutuskan soalan-soalan atau hal-hal tentang kesahan taraf kanak-kanak beragama Islam berkaitan penamaan dan berian paterniti.

Diputuskan (membenarkan sebahagian rayuan)
Oleh Rohana Yusuf PMR, Azahar Mohamed HB (Malaya), Mohd Zawawi Salleh dan Idrus Harun HHMP (keputusan majoriti):

(1) Seksyen 13A APKK khusus berurusan dengan 'nama keluarga' dan memperuntukkan situasi-situasi apabila maklumat tambahan boleh direkodkan dalam Daftar. Berikutan s. 13A APKK, berkenaan kanak-kanak tidak sah taraf, nama bapa lazimnya boleh direkodkan. Dalam kes kanak-kanak tidak sah taraf, s. 13A(2) APKK memperuntukkan nama keluarga ibu boleh direkodkan jika si ibu ialah pemberi maklumat dan dia memberi maklumat ini secara sukarela. Walau bagaimanapun, jika seseorang yang mengiktiraf dirinya sebagai bapa memohon bawah s. 13 APKK, nama keluarganya boleh direkodkan.

(2) Seksyen 13A(2) APKK ialah lanjutan s. 13, yang membenarkan maklumat tambahan direkodkan dalam Daftar Kelahiran seorang anak tidak sah taraf. Maklumat tambahan tersebut ialah nama keluarga, jika ada, si ibu atau si bapa kanak-kanak tersebut. Berdasarkan maksud biasa, s. 13A bukan peruntukan yang wajib terpakai pada kesemua kes. Permohonannya cuma relevan pada orang yang mempunyai nama keluarga, berdasarkan perkataan 'jika ada' bawah undang-undang. Seksyen tersebut juga menimbangkan kes-kes seorang yang ingin didaftarkan tetapi tidak mempunyai nama keluarga. Ini tidak mendiskriminasi antara orang Islam dan bukan Islam. Ini hanya mendiskriminasi antara seorang yang mempunyai nama keluarga dan seorang yang tidak.

(3) Terma 'nama keluarga' tidak ditakrifkan bawah APKK. Berdasarkan maksud lazim kamus, terdapat perbezaan antara nama peribadi dan nama keluarga. Dalam kes ini, MEMK tidak boleh menjadi nama peribadi dan nama keluarga pada masa sama. MEMK bukan nama keluarga, nama keturunan atau nama yang diwarisi yang turut sama dikongsi dengan, contohnya, isteri dan semua ahli keluarganya. Seperti yang amnya difahami, perkataan 'bin' atau 'binti' dalam budaya penamaan Melayu bermaksud anak lelaki atau anak perempuan seseorang. Dalam erti kata lain, 'bin' atau 'binti' dikaitkan dengan nama peribadi seseorang dan bukan nama keluarga. Badan Perundangan tidak menggubal 'nama keluarga' secara sia-sia. Seksyen 13A APKK berniat membenarkan nama keluarga sebagai maklumat tambahan untuk ditambah dalam Daftar Kelahiran dan sijil kelahiran. Secara semula jadinya, jika seseorang tidak mempunyai nama keluarga, s. 13A APKK tidak terpakai padanya.

(4) Nama keluarga kanak-kanak tersebut tidak pernah menjadi isu di hadapan KPPN. Mahkamah Rayuan, dalam mentafsir s. 13A APKK, gagal menimbangkan terdapat perbezaan antara nama peribadi dan nama keluarga. 'MEMK' jelas bukan satu nama keluarga, nama keturunan atau nama yang diwarisi yang turut sama dikongsi dengan, contohnya, isterinya dan semua ahli keluarganya. Sebaliknya, 'MEMK' nama peribadinya.

(5) Orang Melayu tidak mempunyai nama keluarga. Menamakan kanak-kanak tersebut dengan 'bin MEMK' atas asas ini nama keluarga bapanya, bawah s. 13A APKK, adalah tidak berasas menurut undang-undang dan fakta. Seksyen 13A APKK jelas dalam bahasanya dan tidak mewajarkan lain-lain kaedah tafsiran statutori, baik kaedah bertujuan mahupun kaedah keemasan. Seksyen 13A APKK tidak terpakai pada orang Melayu di Malaysia, dan tidak terpakai pada pendaftaran kelahiran kanak-kanak Melayu orang Islam. Seksyen ini tidak membolehkan kanak-kanak dinamakan dengan nama peribadi seseorang yang mengiktiraf dirinya sebagai bapa kerana nama peribadi si bapa itu bukan nama keluarga. KPKK bertindak betul, bawah undang-undang, dalam tidak membenarkan permohonan untuk menamakan kanak-kanak tersebut dengan 'bin MEMK'. Bahagian keputusan KPKK ini tidak mewajarkan campur tangan rayuan.

(6) Perlembagaan Persekutuan ('PP') dan latar belakang sejarah undang-undang Malaysia menerima bahawa orang Islam di negara ini tertakluk pada undang-undang am yang digubal oleh Parlimen dan undang-undang Islam Negeri yang digubal oleh Badan Perundangan setiap Negeri. Perkara 74(2) PP memberi kuasa kepada Badan Perundangan Negeri di Malaysia untuk menggubal undang-undang tentang perkara-perkara yang disenaraikan dalam Senarai II (Senarai Negeri) Jadual Kesembilan PP. Salah satu perkara yang Badan Perundangan Negeri diberi kuasa oleh PP untuk menggubal undang-undang Negeri ialah tentang kesahan taraf

seorang orang Islam. Malah, PP jelas dan nyata mengeluarkan kekompetenan Parlimen untuk menggubal tentang kesahan taraf untuk orang Islam.

(7) Seorang kanak-kanak beragama Islam yang tidak sah taraf tidak boleh diberi nama bapanya dalam Islam dan ini jelas dilihat apabila setiap perundangan tentang perkara ini, dalam Enakmen setiap Negeri di Malaysia, mengandungi larangan yang sama. MEMK dan NAW adalah orang Islam yang berkahwin bawah undang-undang Islam dan kelahiran kanak-kanak tersebut berlaku di Johor. Oleh itu, mereka tertakluk pada undang-undang Islam di Negeri Johor, khususnya Enakmen Undang-undang Keluarga Islam (Negeri Johor) 2003 ('Enakmen') dan Enakmen ini jelas tentang larangan tersebut.

(8) KPPN bertindak betul dalam menolak permohonan responden-responden agar kanak-kanak tersebut diberikan namanya iaitu 'bin MEMK' bukan sahaja kerana s. 13A APKK tidak terpakai tetapi beliau juga mengambil kira undang-undang bertulis yang terpakai pada responden-responden dalam perundangan Negeri. KPPN, dalam menolak permohonan responden-responden, tidak boleh dikatakan tidak munasabah. Keputusan beliau untuk tidak membenarkan nama penuh kanak-kanak tersebut sebagai '… bin MEMK' jelas disokong undang-undang yang terpakai pada responden-responden. Tambahan lagi, undang-undang bertulis sedemikian tidak selaras dengan apa-apa peruntukan dalam APKK. KPPN bertindak munasabah apabila merujuk undang-undang Islam dalam mendaftarkan kelahiran seorang kanak-kanak beragama Islam yang tidak sah taraf. Keputusan KPPN menolak untuk memberi nama si bapa, MEMK, kepada kanak-kanak tersebut selaras dengan undang-undang dan tidak tercemar dengan ketaksahan, ketakrasionalan atau ketakaturan tatacara.

(9) Dalam melaksanakan pendaftaran kelahiran kanak-kanak orang Islam, KPPN boleh bersandar pada undang-undang Islam yang terpakai pada kanak-kanak tersebut. Pegangan *fatwa* peringkat kebangsaan ialah bahawa kanak-kanak tidak sah taraf mestilah dinamakan 'bin Abdullah' atau 'binti Abdullah' tidak mengira sama ada kelahirannya disusuli oleh perkahwinan ibu bapanya. Oleh kerana tiada *fatwa* tentang bagaimana hendak menamakan anak tidak sah taraf diwartakan di Johor, KPPN tidak boleh mengenakan *fatwa* MFK pada responden-responden. *Fatwa* kebangsaan hanya boleh terpakai di Negeri Johor berdasarkan s. 52(1) Enakmen. Dalam mengenakan *fatwa* MFK, tanpa mematuhi s. 52 Enakmen, KPPN melangkaui kuasa atau kuasa yang diberi kepada Jawatankuasa Fatwa Negeri Johor dalam membubuh 'bin Abdullah' pada nama kanak-kanak tersebut. Tindakan KPPN juga selaras dengan s. 47 Enakmen kerana hanya Sultan Johor sahaja yang boleh memperkenankan penerbitan satu-satu *fatwa*. Oleh kerana Jawatankuasa Fatwa Negeri Johor tidak menggunakan *fatwa* MFK ini, KPPN tidak boleh memutuskan bahawa *fatwa* MFK ialah *fatwa* yang terpakai pada

responden-responden. KPPN tiada asas bawah undang-undang untuk membubuh nama 'bin Abdullah' dalam kes ini dan keputusan sedemikian oleh KPPN dipersoal.

(10) Catatan 'Permohonan Seksyen 13' tidak boleh diputuskan sebagai mendiskriminasi kerana ini satu gambaran sebenar fakta yang menyelubungi pendaftaran kelahiran kanak-kanak tersebut. Sebahagian rayuan perayu dibenarkan dan perintah-perintah Mahkamah Rayuan diketepikan. KPPN diarahkan memadam 'bin Abdullah' daripada sijil kelahiran kanak-kanak tersebut. Nama kanak-kanak tersebut, tanpa 'bin Abdullah' kekal, selaras dengan permohonan yang dibuat oleh responden-responden.

Oleh David Wong Dak Wah HB (Sabah & Sarawak) (menentang):

(1) Kecuali kaum Cina, majoriti rakyat Malaysia, termasuk orang Islam, tidak mempunyai 'nama keluarga'. Membaca 'nama keluarga' agar termasuk 'nama keluarga patronimi' adalah selaras dengan tujuan dan matlamat APKK. Tajuk panjangnya menyatakan APKK ialah Akta 'berhubungan dengan pendaftaran kelahiran dan kematian'. Tidak logik untuk membaca perkataan 'nama keluarga' secara ketat dan menafikan majoriti rakyat Malaysia nama keluarga jika ungkapan tersebut termasuk 'nama keluarga patronimi'. Membaca ss. 13 dan 13A APKK bersekali, seorang bapa anak tidak sah taraf yang berhajat agar anak lelaki atau anak perempuannya membawa nama keluarganya tentunya tidak terkecuali daripada berbuat demikian berdasarkan bahasa APKK.

(2) Seksyen 13 APKK, iaitu satu-satunya peruntukan lain tentang kanak-kanak tidak sah taraf, dan hanya berurusan dengan pendaftaran nama bapa dalam sijil kelahiran, dengan sendirinya tidak cukup untuk menentukan apakah yang sepatutnya menjadi 'nama penuh' kanak-kanak tersebut. Selaras dengan itu, s. 13 APKK perlu dibaca bersekali dengan s. 13A(2) untuk menentukan bagaimana kanak-kanak tersebut harus dinamakan. 'Nama keluarga', bawah s. 13A APKK bertujuan menyertakan nama keluarga patronimi dan s. 13A adalah bertujuan untuk terpakai pada kanak-kanak tidak sah taraf – orang Islam atau tidak. Oleh kerana tiada lain-lain peruntukan dalam APKK yang menyokong sandaran perayu-perayu pada konvensyen 'bin Abdullah' dan berdasarkan sifat APKK yang tidak mendiskriminasi, tiada apa-apa cadangan munasabah bahawa kanak-kanak beragama Islam yang tidak sah taraf boleh diberi nama keluarga selain nama keluarga bapa kandungnya. Perayu-perayu bertindak bertentangan dengan peruntukan jelas s. 13A APKK apabila menolak permohonan responden-responden bawah s. 27(3) APKK.

(3) Perayu-perayu tidak berbidang kuasa mengguna pakai undang-undang Islam apabila pendaftaran kelahiran kematian dalam konteks item 12(1) Senarai Persekutuan adalah berkaitan. Pendaftaran kelahiran dan

kematian adalah hal perkara yang terangkum eksklusif bawah Senarai Persekutuan tanpa apa-apa hubung kait dengan Senarai Negeri. Ini adalah tanpa apa-apa prejudis terhadap konsep kesahan taraf bawah undang-undang. Kesahan taraf seorang yang beragama Islam ialah hal perkara yang terangkum secara ketat dalam bidang kuasa Senarai Negeri. Paterniti dan kesahan taraf adalah dua konsep yang asing dan berbeza dan pendaftaran nama keluarga bapa semata-mata tidak mengesahkan taraf seorang anak yang tidak sah taraf. Selepas mendaftarkan MEMK sebagai bapa, tiada justifikasi rasional dalam peruntukan APKK untuk perayu-perayu memberikannya nama keluarga 'bin Abdullah' dan bukan nama keluarga 'bin MEMK'. Para pendraf PP sengaja memilih untuk mendraf dalam terma dan cara sedemikian demi menggariskan perbezaan nyata antara pendaftaran kelahiran dan kematian dalam satu bahagian, dan menentukan kesahan taraf dalam satu lagi bahagian. Akibatnya, kesimpulan nyata adalah bahawa perayu-perayu perlu mengguna pakai peruntukan APKK kerana Akta ini wujud. Keputusan perayu-perayu sama sekali tidak boleh dipertahan bawah undang-undang.

(4) Tiada asas undang-undang untuk perayu-perayu merujuk pada undang-undang dan prinsip undang-undang Islam kerana kesemuanya terdiri daripada badan Persekutuan yang diwujudkan bawah undang-undang Persekutuan yang kuasanya dihadkan oleh Senarai Persekutuan. Sandaran perayu-perayu pada konvensyen 'bin Abdullah' tidak disetujui oleh undang-undang dan satu kekhilafan yang mesti dibetulkan.

(5) Mahkamah Rayuan mengambil perhatian bahawa perkataan beroperasi s. 27(3) APKK ialah 'boleh'. Kes-kes undang-undang yang diputuskan telah memutuskan bahawa perkataan 'boleh' amnya memberi kuasa budi bicara. Mahkamah Rayuan seterusnya mengambil perhatian bahawa s. 13A(2) APKK memberi MEMK kebolehan menggunakan nama keluarganya untuk anaknya yang tidak sah taraf, iaitu kanak-kanak tersebut. Mahkamah Rayuan selanjutnya memutuskan bukanlah dalam kuasa perayu-perayu untuk sewenang-wenangnya memilih nama 'bin Abdullah' dan bukan 'bin MEMK'. Penghakiman Mahkamah Rayuan betul sepenuhnya. Walaupun perkataan 'boleh' memberi budi bicara, prinsip utama undang-undang pentadbiran adalah bahawa budi bicara tidak semestinya mutlak mahupun terpakai atau ditolak untuk terpakai sesuka hati oleh pembuat keputusan. Budi bicara mesti dijalankan selaras dengan undang-undang, mengetepikan semua pertimbangan tidak relevan sambil mengambil kira semua pertimbangan-pertimbangan relevan. Perayu-perayu hanya layak menjalankan budi bicara mereka bawah budi bicara s. 27(3) APKK melalui satu sahaja cara; dengan membetulkan kesilapan seperti yang dipohon dalam permohonan responden-responden.

(6) Tiada alasan yang boleh diterima tentang kenapa status seorang anak tidak sah taraf perlu dihebahkan kepada semua orang dan siapa-siapa sahaja. Sijil kelahiran ialah dokumen penting dan mengandungi pelbagai urusan dengan Kerajaan dan orang-orang persendirian. Apakah matlamat yang dicapai dengan mempamerkan status ketaksahan taraf? Ini mengundang akibat serius dan tidak adil pada kesejahteraan emosi dan masa hadapan mana-mana kanak-kanak. Kanak-kanak tidak bertanggungjawab atas hal keadaan yang dihadapinya dan apabila undang-undang membenarkan kanak-kanak memikul stigma sedemikian, undang-undang ini tidak mementingkan kepentingan kanak-kanak. Kepentingan kanak-kanak mesti menjadi kepentingan utama dalam semua undang-undang, polisi dan keputusan yang memberi kesan pada mereka. Hak mereka untuk diiktiraf sebagai ahli keluarga satu-satu keluarga tidak seharusnya dirampas. Ini bukan satu hujahan beremosi tetapi satu pengiktirafan wajar bahawa hak sedemikian adalah hak berperlembagaan.

(7) Mahkamah Rayuan mencapai keputusan yang betul dengan memerintahkan penyingkiran pengendorsan s. 13. Tiada alasan yang boleh dipercayai untuk menyimpang daripada keputusan dan alasan Mahkamah Rayuan. Rayuan ditolak dan kesemua perintah Mahkamah Rayuan disahkan.

Oleh Nallini Pathmanathan & Abang Iskandar HHMP (menentang):

(1) APKK digubal menurut item 12, Senarai Persekutuan dalam Jadual Kesembilan, yang berkaitan banci dan statistik dalam negara. Ini terpakai pada semua orang dalam negara, tanpa mengira kaum dan agama. Tiada perbezaan dibuat tentang keterpakaian peruntukan APKK pada pelbagai kaum yang terdiri daripada warganegara populasi majmuk yang membentuk Malaysia. APKK juga tidak berkait dengan, menyatakan atau memperuntukkan tentang kesahan taraf, konvensyen penamaan, amalan kebudayaan atau undang-undang keagamaan. Dalam kata lain APKK ialah satu Akta yang keseluruhannya sekular.

(2) Maksud 'nama keluarga' ialah satu soalan undang-undang memerlukan tafsiran statutori. Pandangan pakar tentang perkara ini sama sekali tidak relevan. Tidak seorang pun pakar yang mengutarakan pandangan berkaitan tafsiran statutori 'nama keluarga' dalam konteks APKK. Pakar-pakar tersebut tidak menjawab isu sama ada 'nama keluarga' termasuk nama keluarga patronimi, khususnya dalam konteks APKK. Tujuan APKK ialah menyediakan tempat simpan penuh atau daftar kelahiran dalam negara. Ciri utama daftar ini ialah identiti ibu dan bapa, iaitu ibu dan bapa kandung, direkod. Ini memberi seorang kanak-kanak satu identiti. Dalam konteks kanak-kanak tersebut, paterniti bapanya tidak menjadi isu. Bagi tujuan mendaftar kelahirannya dan pengenalan ibu bapa kandungnya, kanak-kanak tersebut wajar diberi nama bapa kandungnya kerana fakta ini tidak dipertikai.

(3) Mengguna pakai pendekatan bertujuan, adalah diikuti bahawa objektif s. 13A APKK ialah membolehkan atau membantu kemasukan nama bapa jika seorang kanak-kanak tidak sah taraf. Ini membenarkan paterniti dibuktikan untuk seorang kanak-kanak tidak sah taraf jika si bapa mengiktiraf paterniti, dan ingin dan membenarkan namanya dicatat sebagai nama keluarga kanak-kanak tersebut. Pendek kata, seksyen ini membenarkan pengiktirafan rasmi paterniti, untuk tujuan rekod dalam Daftar Kelahiran. Paterniti menyediakan maklumat tentang identiti bapa kandung seorang kanak-kanak. APKK digubal untuk menyediakan bancian semua warganegara melalui sistem pendaftaran kelahiran dan kematian dalam seluruh negara. Oleh kerana ini tujuannya, pemakaian pendekatan bertujuan pada tafsiran statutori akan menghasilkan keputusan bahawa terma 'nama keluarga' dalam s. 13A sepatutnya ditafsir sebagai merujuk pada kedua-dua nama patronimi dan juga maksud kamus perkataan tersebut.

(4) Pendapat pakar yang dirujuk dalam penghakiman majoriti mungkin, asasnya, memperuntukkan orang Melayu tidak mempunyai nama keluarga seperti yang difahami dalam tradisi dan budaya bahasa Inggeris. Walau bagaimanapun, tidak diikuti bahawa s. 13A menjadi tidak terpakai pada semua lapisan masyarakat atau warganegara dalam negara ini. Kesimpulan yang lebih logik dan munasabah yang selaras dengan pendekatan bertujuan dalam tafsiran statutori ialah mentafsir 'nama keluarga' dalam konteks objektif APKK, agar memaksudkan nama si bapa. Tujuan s. 13A ialah membolehkan anak tidak sah taraf mempunyai nama bapanya ditambah agar identiti bapa kandungnya dinyatakan dengan jelas.

(5) Menyatakan orang Melayu dan/atau orang Islam tidak mempunyai nama keluarga menjadikan ss. 13A dan 13 APKK lewah. Ini mencadangkan Parlimen hanya memaksudkan agar peruntukan sedemikian, berkaitan 'nama keluarga' seorang kanak-kanak hanya terpakai pada kategori khusus warganegara Malaysia yang mempunyai nama keluarga, seperti yang difahami dari segi adat. Tafsiran sedemikian membawa pada pengecualian majoriti populasi Malaysia. Tafsiran selaras dengan gaya ketat 'nama keluarga' yang mengecualikan 'nama keluarga patronimi', berdasarkan anggapan orang Islam amnya tidak mempunyai nama keluarga, juga mempunyai kesan mengecualikan semua orang yang bukan Islam dan tidak mempunyai nama keluarga. Kebanyakan kaum, seperti warganegara Malaysia berketurunan India atau dari Sabah dan Sarawak tidak mempunyai nama keluarga tradisi dan sememangnya bergantung pada nama keluarga patronimi. Oleh itu, bacaan ketat akan melahirkan keputusan yang tidak sesuai. Oleh kerana APKK tidak membezakan pemakaian antara seorang orang Islam dan seorang bukan Islam, dan hingga dan melainkan Parlimen meminda undang-undang ini agar mempunyai kesan tersebut, ss. 13 dan 13A APKK terpakai pada semua orang. Perayu-perayu mempunyai

kewajipan undang-undang memberikan kanak-kanak tersebut nama 'kanak-kanak bin MEMK', mewakili nama peribadi MEMK sebagai nama keluarga patronimi.

(6) MFK ialah badan Persekutuan dan *fatwa*nya tidak mempunyai kuat kuasa undang-undang. Jika *fatwa* MFK diwartakan oleh Negeri yang berkenaan, maka ini terpakai sebagai sebahagian undang-undang Negeri tersebut. Walau bagaimanapun, *fatwa* MFK dalam kes ini tidak diwartakan di Johor dan jika *fatwa* ini diwartakan di Johor dan menjadi undang-undang Negeri, ini, dalam apa-apa jua kes, tidak mempunyai kesan setakat tafsiran dan pemakaian APKK adalah berkenaan. Struktur intrinsik PP menjadikan semua undang-undang Persekutuan, yang disebar luas untuk tujuan am Persekutuan, sekular. Undang-undang Islam hanya boleh digubal oleh Negeri dan mempunyai kesan dalam Negeri tersebut dalam hal-hal perkara yang Negeri ini punyai bidang kuasa. Perayu-perayu bertindak *ultra vires* APKK dengan merujuk sumber undang-undang luar dalam menjalankan kuasanya mendaftar bawah undang-undang tersebut, yang Perlembagaan Persekutuan dan APKK sebaliknya tidak membenarkan mereka lakukan.

(7) Mengeluarkan perintah agar memasukkan hanya nama kanak-kanak tersebut tanpa menyertakan nama MEMK tidak boleh dipertahan bawah undang-undang. Tiada autoriti undang-undang yang mencadangkan nama keluarga patronimi 'bin Abdullah' betul sebagaimana tiada autoriti yang mencadangkan hanya nama kanak-kanak tersebut sahaja yang boleh dibubuh. Memberinya hanya namanya sendiri tanpa nama bapanya sebagai nama penuhnya terjumlah sebagai pengiktirafan tersirat bahawa undang-undang Islam yang disebar luas oleh Negeri mengisytiharkannya sebagai tidak sah taraf terpakai.

(8) Mahkamah Rayuan mengambil kira prinsip undang-undang yang betul, mencapai kesimpulan yang betul dan mengeluarkan perintah-perintah yang betul. Rayuan ditolak sepenuhnya tanpa perintah terhadap kos. Keputusan Mahkamah Rayuan disahkan.

Case(s) referred to:

A Child & Ors v. Jabatan Pendaftaran Negara & Ors [2017] 7 CLJ 533 CA ***(refd)***
Associated Provincial Picture Houses Ltd v. Wednesbury Corp [1948] 1 KB 223 ***(refd)***
CAS v. MPPL & Anor [2019] 2 CLJ 454 CA ***(refd)***
Che Omar Che Soh v. PP [1988] 2 MLJ 55 ***(refd)***
Director of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors And Other Appeals [2017] 3 CLJ 1 FC ***(refd)***
Ex Parte Fewings [1995] 1 All ER 513 ***(refd)***
Government of Malaysia & Ors v. Loh Wai Kong [1979] 1 LNS 22 FC ***(refd)***
H156 [1999] SLR 756 ***(refd)***
Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC ***(refd)***
Kamariah Ali lwn. Kerajaan Negeri Kelantan, Malaysia & Satu Lagi Dan Rayuan Yang Lain [2002] 3 CLJ 766 CA ***(refd)***

Lina Joy lwn. Majlis Agama Islam Wilayah Persekutuan & Yang Lain [2007] 3 CLJ 557 FC ***(refd)***
Mamat Daud & Ors v. The Government of Malaysia [1988] 1 CLJ 11; [1988[1 CLJ (Rep) 197 SC ***(refd)***
Minister Of Labour & The Government Of Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC ***(refd)***
Mohd Habibullah Mahmood v. Faridah Dato' Talib [1993] 1 CLJ 264 SC ***(refd)***
National Union of Hotel, Bar and Restaurant Workers v. Minister of Labour and Manpower [1980] 1 LNS 50 FC ***(refd)***
Nitaben Nareshbai Patel v. State of Gujarat & Ors (2008) 1 GLR 884 ***(refd)***
Ong Chan Tow v. Regina [1963] 1 LNS 88 HC ***(refd)***
Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***
R (on the application of Hasan) v. Blackfriars of Crown Court [2006] 1 All ER 817 ***(refd)***
Ramah v. Laton [1927] 6 FMSLR 128 ***(refd)***
Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***
Sivarasa Rasiah v. Badan Peguam Malaysia [2010] 3 CLJ 507 FC ***(refd)***
YB Menteri Sumber Manusia v. Association Of Bank Officers, Peninsular Malaysia [1999] 2 CLJ 471 FC ***(refd)***
ZI Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor; Kerajaan Malaysia & Anor (Intervener) [2015] 8 CLJ 621 FC ***(refd)***

Legislation referred to:
Administration of Islamic Law (Federal Territories) Act 1993, s. 34
Administration of the Religion of Islam (State of Johor) Enactment 2003, ss. 47, 48, 49, 52(1)
Births and Deaths Registration Act 1957, ss. 4, 7(2), 12(1), 13, 13A(1), (2), 27(3), 33(1), (2)
Births and Deaths Registration Rules 1958, r. 3
Courts of Judicature Act 1964, ss. 15(2), 78
Evidence Act 1950, ss. 45(1), 112
Federal Constitution, arts. 3(1), (4), 5, 8(1), 10, 12, 74(1), (2), (3), 160(2), Ninth Schedule List I items 3(e), 4(e)(ii), 12(a), List II item 1
Islamic Family Law (State of Johor) Enactment 2003, s. 111
Law Reform (Marriage and Divorce) Act 1976, s. 3(3)
Legitimacy Act 1961, ss. 4, 5
National Registration Regulations 1990, reg. 24(1)
Penal Code, s. 298A
Rules of Court 2012, O. 14A

The Registration of Births and Deaths Act 1969 [Ind], s. 15

Other source(s) referred to:
John Serensen, *'Patronymics in Denmark and England' The Dorothea Coke Memorial Lecture in Northern Studies,* 20 May 1982, p 3
Preimplantation Genetic Diagnosis For Social Sex Selection: The Possible Implications on Malaysia's Sex Ratio [2012] 1 LNS(A) lix
Oxford's Advanced Learner's Dictionary, 7th edn, pp 1111, 1545

For the appellants - Suzana Atan, Arik Sanusi Yeop Johari, Shamsul Bolhassan, Zawawi Ghazali & Mazlifah Ayob; SFCs
For the respondents - K Shanmuga, Nizam Bashir, Surendra Ananth & Kee Hui Yee; M/s Nizam Bashir & Assocs

For the intervener - Sulaiman Abdullah, Ikbal Salam, Zainul Rijal Abu Bakar, Faizal Ahmad & Zulsyahmi Husaini Kamarulzaman; M/s Ikbal Salam & Assocs
Watching brief:
For the Malaysia Bar Council - Goh Siu Lin; M/s Kee Sern, Siu & Huey
For the Persatuan Peguam-Peguam Muslim Malaysia - Hafez Zalkapli; M/s Mohd Amin Ng & Assocs
Noor Adzrie Mohd Noor & Mohd Akmal Abu Bakar; M/s Zainul Rijal Talha & Amir
Voice of children - Siera Sacha; M/s Siera & Sharizad
Amicus curie - Halimatunsa'diah Abu Ahmad & Azlan Sulaiman; M/s Adi & Co

[Editor's note: For the Court of Appeal judgment, please see A Child & Ors v. Jabatan Pendaftaran Negara & Ors [2017] 7 CLJ 533 (overruled in part)
For the High Court judgment, please see [2016] 1 LNS 1815 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Rohana Yusuf PCA:

Introduction

[1] This appeal raises the issue of whether the Director General of National Registration ("DGNR") possesses the authority, under the Births and Deaths Registration Act 1957 ("the BDRA") to ascribe "bin Abdullah" instead of the biological father to the name of an illegitimate Muslim child in registering the birth of that child. Related to this issue is whether the DGNR in doing so was correct in giving consideration to the personal law of a Muslim person.

[2] The High Court had on 4 August 2016, ruled the legal issue by holding that the DGNR had such power, but it was reversed by the Court of Appeal on 25 May 2017. On the decision of the Court of Appeal, this court granted the DGNR and two others (the appellants) leave to appeal on three questions of law.

Background Facts

[3] The first respondent ("the child") is the son of MEMK (the second respondent) and NAW (the third respondent). MEMK and NAW are both Muslims.

[4] The child was born in Johor on 17 April 2010 which was five months and 24 days (five months and 27 days according to the Islamic Qamariah calendar) from the date of the marriage of MEMK with NAW, which took place on 24 October 2009. According to Muslim law, a child is illegitimate if he is born less than six *qamariah* months from the date of his parents' marriage. It is therefore undisputed that the child is an illegitimate child under Muslim law.

[5] The child's birth was registered late being two years after his birth. It was a late application made pursuant to s. 12(1) and also s. 13 of the BDRA. Section 13 relates to illegitimate child. At the time of making the application, the parents jointly applied for MEMK's name to be entered in the Birth Register as the father of the child.

[6] The DGNR issued the respondent child's birth certificate on 6 March 2012. In that birth certificate, the DGNR, in compliance with s. 13 entered the name of MEMK in the column on particulars of the father. However, the child's full name was given as "bin Abdullah", instead of "bin MEMK". The child's birth certificate also contained a notation "permohonan s. 13" which was an explicit acknowledgment that the application for the registration of birth, is for an illegitimate child.

[7] About three years later, on 2 February 2015 MEMK applied under s. 27(3) of the BDRA, to correct the child's name from "bin Abdullah" to that of his name, MEMK. The application was rejected by the DGNR *vide* a letter dated 8 May 2015 on the basis that the child being an illegitimate Muslim child cannot be ascribed to the name of his biological father, MEMK. And the child was to be named "bin Abdullah" in line with the *fatwa* issued on the subject.

In The High Court

[8] The decision of the DGNR was challenged by way of judicial review, at the High Court seeking for various declarations and reliefs as stated below:

(i) a declaration that a discriminatory decision by the appellants against the illegitimate status of the child is against the law;

(ii) a declaration that the insertion of the entry "permohonan s. 13" in the child's birth certificate is null and void and in violation of the child's right;

(iii) a declaration that the DGNR's decision dated 8 May 2015 is against the law;

(iv) a *certiorari* to quash the decision; and

(v) a *mandamus* to compel the DGNR:

  (a) to remove the entry "permohonan s. 13" from the child's birth certificate;

  (b) to alter the child's birth certificate "bin Abdullah" with MEMK's name;

  (c) to alter the father's and mother's record accordingly; and

  (d) to refer the child's father as MEMK and not Abdullah.

[9] The central issues canvassed before the High Court were these:

A (i) whether the DGNR's refusal to correct or alter the particulars "bin Abdullah" to be substituted with MEMK in the Birth Register was made in accordance with law; and

(ii) whether the entry of "bin Abdullah" and the notation "permohonan s. 13" in the child's birth certificate infringed the child's fundamental
B liberties under arts. 5, 8, 10 and 12 of the Federal Constitution.

[10] The learned High Court Judge dismissed the respondents' application on the reason that the DGNR's refusal to alter the child's name from "bin Abdullah" to "MEMK" was in accordance with law and that the entry "permohonan s. 13" in the child's birth certificate did not violate any of the
C child's fundamental constitutional liberties. The learned High Court Judge also opined that the DGNR was not wrong to rely on Islamic law on legitimacy in rejecting the application to amend the child's full name as "bin MEMK".

D **In The Court Of Appeal**

[11] In reversing the decision of the High Court, the Court of Appeal found that the learned High Court Judge had failed to address the existence of s. 13A(2) of the BDRA in arriving at its decision. Upon examining that provision, the Court of Appeal found and held that the language of s. 13A(2)
E read together with s. 27(3) enabled an illegitimate child to bear either the mother's name or the father's name. And it was held that the DGNR was wrong in dismissing the application of the respondents.

[12] In arriving at that conclusion, the Court of Appeal opined that the BDRA in its true purport made no distinction between a Muslim child and
F a non-Muslim child hence s. 13A(2) never prescribes a different treatment for illegitimate Muslim children. It further found that s. 13A(2) did not require an illegitimate Muslim child to bear the father's name as "bin Abdullah". Furthermore, since the father's name has already been entered in the birth certificate, there would be no further necessity to register the child's
G name as "bin Abdullah". The statutory duty of the DGNR was held to merely register births and deaths in the States of Peninsular Malaysia, without more.

[13] In support, the Court of Appeal referred to the decision of the Gujarat High Court in *Nitaben Nareshbai Patel v. State of Gujarat & Ors* (2008) 1 GLR
H 884 which was found to be dealing with a similar provision in India. The ruling in that case by the Gujarat High Court was that "the Registrar was not justified in referring to some guidelines and reading them into the law so as to curtail his own power under s. 15 of the Act." Applying the principle in *Nitaben*, the Court of Appeal similarly held that, the DGNR had acted
I irrationally and outside the scope of his powers in registering "bin Abdullah" as part of the child's name in the child's birth certificate.

[14] The explanation proffered by the DGNR in his affidavit affirmed on 9 March 2016 that the notation "permohonan s. 13" on the child's birth certificate was to assist the relevant agencies in dealing with the issues of inheritance, maintenance, perwalian, marriage, death, citizenship, lineage, *et cetera* did not find favour with the Court of Appeal. It viewed that it was not the DGNR's duty and function under the BDRA to do so. Furthermore, it opined that the foregoing issues could be settled without the need to make the "permohonan s. 13" entry on the child's birth certificate. In its grounds of judgment it was further justified that, since the procedure for the registration of an illegitimate child was spelt out clearly and formally in s. 13A(2), it would be that section and not a *fatwa* that should guide the DGNR in considering an application under it.

[15] The bases relied upon by the DGNR on the 1981 and 2003 *fatwa* issued by the National Fatwa Committee were found to be erroneous. It was found by the Court of Appeal that the *fatwa* relied upon bore no relevance to the DGNR's statutory duty under the BDRA. A *fatwa*, the Court of Appeal said, did not have the force of law. And even if a *fatwa* has any force of law (being made pursuant to State law), the Court of Appeal ruled that, it could not supersede the BDRA, a Federal law.

[16] In the end, the Court of Appeal held that there was nothing in the BDRA that allowed for the importation of substantive principles of Islamic law in the registration process. The impugned decision was a purely administrative function that had nothing to do with Islamic jurisprudence on legitimacy. The duty of the DGNR according to the Court of Appeal, was to follow the procedure laid down in s. 13A(2) and to allow applications, which comply with the necessary requirements under that provision.

In The Federal Court

Preliminary Objection

[17] At the commencement of the hearing of this appeal, Majlis Agama Islam Negeri Johor as intervener, raised by way of a preliminary objection the *de novo* hearing of this appeal. The background to this objection was mainly due to the fact that this court had, on 7 February 2018 heard this appeal before a panel of five, where its judgment was reserved. Two out of the five members had later retired leaving three members to deliver the panel's decision.

[18] A case management was set for this case on 27 July 2018 where a direction for a *de novo* hearing was told to the parties. It was objected to by the appellants and a new hearing date was then fixed on 18 October 2018. Before that date, on 30 July 2018 counsel for the intervener sought clarification on the same, which led to a second case management before the Deputy Registrar on 21 September 2018. Parties were informed that the *de novo* hearing was directed by the then Chief Justice YAA Tan Sri Datuk Seri Panglima Richard Malanjum. The intervener objected as there were still

three judges remained from that earlier panel to deliver its decision pursuant to s. 78 of the Courts of Judicature Act 1964. A hearing date was fixed on 18 October 2018 where the objection was heard by a seven coram of judges. The panel had unanimously held that the direction for *de novo* be set aside.

[19] A decision date of 22 November 2018 was then set before the three remaining judges, whereby Ahmad bin Haji Maarop PCA, declared in open court that the decision of the earlier panel was ready to be pronounced. However, the Attorney General's Chambers sought for a postponement, on the basis that the matter would be resolved amicably. Despite objections by the respondents, the court adjourned the decision. Another case management was set on 24 January 2019 where parties were again informed that the decision was ready. Thereafter, there were only two judges left from the hearing panel and eventually one, making it untenable for any decision to be delivered.

[20] To this preliminary objection, the respondents responded to say that by the hearing date before us, there was no any judge from the earlier panel remained, necessitating a *de novo* hearing.

[21] As such, when this objection was brought before us, we had no other option but to proceed with a *de novo* hearing of this appeal.

The Appeal

Section 13A And Surname

[22] We now proceed to deal with the questions posed before this court, in turn. For convenience, we will begin with question 3, which is:

> Question 3: Whether s. 13A of the Births and Deaths Registration Act 1957 applies to the registration of births of Muslim children enabling the children to be named with the personal name of a person acknowledging to be the father of the children?

[23] To recapitulate, the Court of Appeal found and held that the High Court in dismissing the judicial review application had failed to consider s. 13A of BDRA. It was held that s. 13A would have justified the child's full name as "bin MEMK" and not "bin Abdullah". Section 13A as we understand it, is a relatively newly enacted provision. It deals strictly with "surname", as the short title to it, suggests. It provides for a situation where additional information may be inserted in the Register.

[24] Following s. 13A(1), in respect of a legitimate child, ordinarily the surname of the father may be entered. In the case of an illegitimate child, s. 13A(2) provides that a mother's surname be inserted where the mother is the informant and that she volunteers the information. However, if a person who acknowledges to be the father in accordance with s. 13 so requests, his surname may be inserted. To better appreciate this position, s. 13A is hereby reproduced *in extenso*:

Section 13A. Surname of child

(1) The **surname, if any,** to be entered in respect of a legitimate child shall ordinarily be the surname, if any, of the father.

(2) The **surname, if any,** to be entered in respect of an illegitimate child may where the mother is the informant and volunteers the information, be the surname of the mother; provided that where the person acknowledging himself to be the father of the child in accordance with section 13 requests so, the surname may be the surname of that person. (emphasis added)

The explanatory statement to the Bill explained the background to s. 13A in the following way:

Clause 6 seeks to allow **the use of surname** of the mother where the child is illegitimate and the surname of the putative father only if he requests. (emphasis added)

[25] It is apparent that s. 13A(2) is an extension of s. 13, which allows additional information to be entered in the Birth Register of an illegitimate child. That additional information is the surname, if any, of the mother or the father of the child. It is plainly clear that it allows a surname (if any) of a legitimate child to that of the father, to be stated in the birth certificate and following that, s. 13A(2) provides that where:

(i) the mother is the informant and volunteers the information, be the surname of the mother;

(ii) if the person who acknowledges himself as the father in accordance with s. 13 and on his request then his surname will be inserted.

[26] Given its plain meaning, s. 13A is not a mandatory provision to be applied to all cases. Its application is only relevant to a person who carries a surname, hence the word "if any" in the law. The section too contemplates cases where a person to be registered does not carry a surname. It does not discriminate between Muslim or non-Muslim. It only discriminates between people with surname with one who has none.

[27] The term "surname" is not defined under the BDRA. Hence by the rule on statutory interpretation, ordinary word must be given a plain meaning. The following dictionary meanings of this word are instructive:

(i) *Oxford Dictionary of Law* (6th edn):

"Surname: A family name. Upon marriage a wife is entitled to take her husband's surname (and title or rank) and to continue using it after his death or divorce (unless she uses it for fraudulent purposes) although she is not obliged to do so. A legitimate child, by custom, takes the name of his father and illegitimate child that of his mother (although the father's name may be entered on the birth certificate if both parents agree and an affiliation order names the man as the putative father). Upon adoption a child automatically takes the name of his adoptive parents.

A (ii) *Black's Law Dictionary*, 10th edn:

> Surname: The family name automatically bestowed at birth, acquired by marriage, or adopted by choice. Although in many cultures a person's surname is traditionally the father's surname, a person may take the mother's surname or a combination of the
B parents' surname.

(iii) *Concise Oxford English Dictionary*, 11th edn, revised:

> Surname: 1. Hereditary name common to all members of a family, as distinct from a forename. 2. Archaic a descriptive or allusive name, title, or epithet added to a person's name.

C

(iv) *Oxford Dictionary and Thesaurus*, 2nd edn 2007:

> Surname: An inherited name shared by all members of a family, as distinct from a personal name.

[28] We can safely conclude from the above plain dictionary meaning that
D there is a difference between a personal name and a surname. In the present case, MEMK cannot therefore be a personal name and a family name at the same time. It is not a family name or hereditary name or inherited name commonly shared by for example, the wife and all members of the family as defined by the dictionary meaning.

E **[29]** As generally understood the word "bin" or "binti" in the Malay naming culture means the son or daughter of someone. In other words, the word "bin" or "binti" is attributed to a person's personal name and not a family name. Obviously there is a difference between the meanings of the words "name" and "surname". The Legislature does not legislate "surname"
F in vain. Section 13A is intended to allow a surname as an additional information to be added in the Birth Register and birth certificate. Naturally if someone has no surname, s. 13A cannot be applied to him.

[30] Taking the above definitions, to my mind a surname refers to a family, hereditary and inherited name, distinct from a personal name. In the present
G case, MEMK is obviously not a family name or hereditary name or inherited name commonly shared by, for example, the wife and all members of the family. Instead, it is merely his personal name. This is clear when MEMK and the third respondent at the time of making the s. 13 application, applied for MEMK to be entered in the Birth Register as the father of the child,
H which the DGNR did. In construing s. 13A, we are of the view that the Court of Appeal failed to appreciate that there is a difference between a personal name and a surname. With respect, I am not able to agree with the Court of Appeal's application of s. 13A to the respondents.

[31] In the first place, the surname of the child was never an issue before
I the DGNR. The Court of Appeal had erred in holding that "the purpose of a surname is to identify who the child's father is". There was never an issue on the identity of the father in this case. MEMK's name was already entered

in the Birth Register as the father of the child. We are now only dealing with the issue on additional information as envisaged by s. 13A, which allows a surname to be entered.

[32] It is difficult to appreciate how the personal name of the father may also be a surname at the same time.

[33] In this regard, we agree with the argument in support of the appellants, put forth by Majlis Agama Islam Selangor as "*amicus curiae*", that if a Malay child's surname is that of the father's personal name, s. 13A(2) would not allow MEMK to insert his own personal name after the child's name. Since s. 13A(2) says "the surname of that person" which by this argument would refer to MEMK's father or his family name. So what then is MEMK's surname.

[34] Since this issue was heavily disputed in the oral submissions before us, we welcomed parties to submit further by way of additional written submissions on this particular issue, including to obtain any expert view on the subject.

[35] Following that, Majlis Agama Islam Johor as intervener had submitted by way of an additional written submission dated 21 November 2019 on the issue of whether Malays have surname. In that submission, two experts are cited as authorities. The first is Professor Madya Dr Kassim Thukiman. He is from the Faculty of Social Sciences and Humanities, Universiti Teknologi Malaysia with experiences of researching on issues relating to "Sejarah Melayu dan Sejarah Johor". He had written extensively in the area of history, tracing background of ethnic groups. He has written his opinion titled as "Pandangan Pakar" on this issue as attached in the written submission by the intervener. The other is Professor Madya Dr Mohd Rosli Saludin. He is a Senior Research Fellow from the Institute of the Malay World and Civilization (ATMA), Universiti Kebangsaan Malaysia. He too had undertaken research on topics such as "Adat Melayu Serumpun" and had written quite extensively in the area of "Adat Pepatih". He wrote a separate opinion on the subject.

[36] The Attorney General's Chambers on behalf of the DGNR had enlightened further in the additional written submission filed on 10 January 2020 on this issue. In its submission, an expert opinion of Professor Dr Teo Kok Seong dated 15 December 2019 was enclosed. Professor Dr Teo is from the Institute of Ethnic Studies (KITA), Universiti Kebangsaan Malaysia (UKM). He is now the Principal Research Fellow from that Institute as well as the Institute of the Malay World and Civilization (ATMA), both in UKM. He specialises in the area of "Sosiolinguistik dan Sosiologi Bahasa". He had done research in many areas as described in his *curriculum vitae* which basically relate to ethnic issues.

[37] All the three experts echoed the same views on this subject which I will summaries them as follows:

(i) Malay names are similar to Icelandic naming conventions. For men, the patronym consists of the title bin (from the Arabic, meaning 'son of') followed by his father's personal name. The example given is if Osman has a son called Musa, Musa will be known as Musa bin Osman. For women, the patronym consists of the title binti (from the Arabic, meaning 'daughter of') followed by her father's name. Thus, if Musa has a daughter called Aisyah, Aisyah will be known as Aisyah binti Musa;

(ii) Upon marriage, a Malay woman does not change her name, as is done in many cultures, especially in Western cultures.

(iii) In the context of Malaysia, the Malaysian Chinese are the only major ethnic group in Malaysia to use family names as surname. The other ethnic group like the Malays or the Indian do not carry any surname. Again, the following example has been cited; the name "Leung Chun-ying", with the family name "Leung" placed in front of the given name, "Chun-ying". The surname "Leung" will be passed down from a father to all his children and their children.

(iv) The view also opined that the Malay naming convention is poles apart from the Western or Chinese. A Malay only answer to his personal name and do not have surname, hence calling a Malay by his father's name is inappropriate in Malay culture and in the Malaysian context. Any attempt to rely on the naming in the Western culture in giving surname to the local practice will be a total misplace.

[38] The above observations according to them must be compared to names bearing hereditary titles, as Malays also have hereditary titles. Most of those with these titles are descended from royalty or nobility. Such examples by Patrilineal Royal descent (Malay) are Tunku, Tengku, Raja and Wan. Nonetheless, despite using the hereditary titles, the person's name will be followed by the father's name. For example: "Raja Ahmad bin Raja Ali".

[39] Having examined the experiences and the research undertaken by Professor Dr Teo which was also supported by the other two Professor Madya Dr Kassim and Professor Madya Dr Mohd Rosli, I accept their views as the correct observation.

[40] It is pertinent to note that there was no expert opinion in response, tendered by the respondents to rebut the opinions expressed by the above experts.

[41] The intervener, Majlis Agama Islam Johor had also referred us to the brief guide issued by the Australian Catholic University "ACU National Naming Convention for Asian Names" (Australian Catholic University 2007), which states that:

> Malay names are common in Malaysia and Singapore and reflect a Muslim culture. Family names as such have not existed in Malaysia, and names change from generation to generation, rather than record a lineage.

[42] This is further emphasised in an article published in the Legal Network Series "*Preimplantation Genetic Diagnosis For Social Sex Selection: The Possible Implications on Malaysia's Sex Ratio*" [2012] 1 LNS(A) lix. It is observed that:

> The Malays, on the contrary, place equal importance on the mother's and father's kin, where their descent is generally traced through both parents. As a result, there is no requirement for the continuation of the family name to the next generation for the Malays (Dancz, 1987).

[43] All these observations reinforced and fortified my view that giving a plain meaning to the word surname, it is as clear as daylight that Malays do not have any surname. To name the child as "bin MEMK" on the basis that it is a surname of the father pursuant to s. 13A is therefore without basis legally or factually.

[44] Section 13A is clear in its language and does not call for any other rule of statutory interpretation, purposive or golden rule. In view of the above, I am clear in my mind that s. 13A of the BDRA is not applicable to the Malays in Malaysia, and hence is of no application to the respondents. With respect, the Court of Appeal was plainly wrong to apply s. 13A(2) to the respondents.

[45] In its grounds of judgment, the Court of Appeal had also mentioned that it was guided by the Gujarat High Court case of *Nitaben* (*supra*) in its decision on the application pursuant to s. 27(3). It would be necessary for this court to deal with it. In its grounds of judgment, the Court of Appeal had referred to the case in the following words:

> [33] **We were not referred to any authority directly on section** 27(3) of the BDRA, or have we been able to find any in our research, but the judgment of the Gujarat High Court dealing with a similar provision in *Nitaben Nareshbai Patel v. State of Gujarat & Ors* [2008] 1 GLR 884 which cited with approval the following passage in *Registrar, Birth and Death, Rajkot Municipal Corporation v. Vimal M. Patel Advocate, in Letters Patent* (Appeal No. 231 of 2001 dated 30.3.2001) may throw some light on the issue:
>
> > Since the powers of the Registrar are wide enough to ensure that the entry made in the Registrar does not mislead or give an incorrect impression, it is his duty to ensure that suitable correction is made in the entry to ensure the authenticity of the Register by reflecting the correct state of affairs in the marginal entry that he is required to make. No direction can be issued by any authority to take away the powers of the Registrar of making correction in **entries which are erroneous in form or substance in the Register.** The registrar, therefore, was not justified in referring to some guidelines and reading them so as to curtail his own powers under

> Section 15 of the Act. No guidelines can be issued against the statutory provisions empowering the Registrar to make corrections except by way of rules made by the Government with respect to the conditions on which and the circumstances in which such entries may be corrected or cancelled as provided in Section 15 itself. In our opinion, therefore, the learned single Judge was justified in setting aside the impugned order and directing the appellant Registrar to entertain the application of the respondent and effect the necessary correction in the register in accordance with the provisions of Section 15 of the Act. (emphasis added)

[46] The facts in *Nitaben* were not exactly the same as in the present case. In *Nitaben*, the Gujarat High Court was dealing with s. 15 of the Indian Registration of Births and Deaths Act 1969, which is similar to s. 27(3) of our BDRA. The Gujarat High Court was not interpreting a provision similar to s. 13A(2) of our BDRA. What the Gujarat High Court held was that "the Registrar was not justified in referring to some guidelines and reading them so as to curtail his own powers under s. 15 of the Act." In our case, the DGNR was not dealing with guidelines, but with the personal law applicable to the respondents as envisaged by the Federal Constitution. On the application made pursuant to s. 27(3), the Court of Appeal relied on the Gujarat High Court case of *Nitaben* (*supra*) as relied upon by the Court of Appeal. I am also of the view that the Court of Appeal was in error when it referred to that case to support its decision.

[47] Question 3 therefore is answered in the following way: Section 13A of the Births and Deaths Registration Act 1957 does not apply to registration of births of Malay Muslim children. It does not enable the children to be named with the personal name of a person acknowledging to be the father because the personal name of the father is not a surname.

[48] Without even deliberating on further issues, we find the DGNR was correct in law not to allow the application to name the first respondent as "bin MEMK". That part of the DGNR's decision does not call for judicial interference.

Personal Law Of The Respondents

[49] I next move to question 1 which is, whether in performing registration of births of Muslim children, the Registrar of Births and Deaths may refer to and rely on sources of Islamic law on legitimacy? As alluded to earlier, the DGNR had reasoned the rejection on the fact that a Muslim illegitimate child cannot be ascribed to his biological father. In a letter dated 8 May 2015 he stated the rejection thus:

> Dukacita dimaklumkan bahawa permohonan pembetulan maklumat dalam Daftar Kelahiran anak tuan/puan telah ditolak kerana TEMPOH TARIKH KELAHIRAN DAN TARIKH PERKAHWINAN TIDAK MENCUKUPI BAGI SABJEK DINASABKAN KEPADA BAPA.

[50] Before I venture any further in deliberating this particular issue, this is a suitable juncture to first of all understand and appreciate the position of a Muslim in our legal constitutional history and the Malaysian legal system. As early as 1927, pre-Merdeka, Thorne J in the case of *Ramah v. Laton* [1927] 6 FMSLR 128 had pronounced that:

> Muslim law is not foreign law but local law; it is the law of the land, and the local law is a matter of which court must take judicial notice. The court must propound the law.

[51] The Federal Constitution and the background to our legal history has always accepted that Muslims in this country are subjected to the general law enacted by Parliament as well as Islamic State laws enacted by the Legislature of each State. These constitutional arrangements are clearly stipulated in the various provisions of the Federal Constitution. Article 74(2) gives the Legislature of a State in Malaysia the authority to make laws on the matters stated in List II (State List) in the Ninth Schedule of the Federal Constitution. It is therefore by constitutional prescription that the Muslims in this country are subjected to the general law enacted by Parliament as well as Islamic laws enacted by the State Legislature. This is how art. 74(2) of the Federal Constitution states:

> Article 74: Subject matter of Federal and State Laws
>
> (2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

[52] The legitimacy of a Muslim person is one of the areas in which the State Legislature is authorised by the Federal Constitution to enact State law. In fact, the Federal Constitution has explicitly and expressly ousted the legislative competence of Parliament to legislate in respect of legitimacy for Muslims. Based on item 4(e)(ii) of List I (Federal List) in the Ninth Schedule of the Federal Constitution, the matters excluded from Federal Legislative competence include Islamic personal law relating to marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gift or succession, testate and intestate.

[53] The intention of the framers of the Federal Constitution that Muslims in this country shall be governed by Islamic personal and family law is therefore clearly embedded in the Federal Constitution. This was expressed by the then Supreme Court in *Mohd Habibullah Mahmood v. Faridah Dato' Talib* [1993] 1 CLJ 264; [1992] 2 MLJ 793 where Harun Hashim SCJ (as he then was) said:

> Taking an objective view of the Constitution, it is obvious from the very beginning that the makers of the Constitution clearly intended that Muslims of this country shall be governed by Islamic Family Law as evident from the Ninth Schedule to the Constitution.

[54] We know that the personal law and family law are the heart of the Shariah and that part of Islamic law has remained in force to govern the lives of Muslim in Malaysia. The position of Islam in the Federal Constitution was further elaborated by various case laws. Abdul Hamid Mohamad HMR (as he then was) in the case of *Kamariah Ali lwn. Kerajaan Negeri Kelantan, Malaysia & Satu Lagi Dan Rayuan Yang Lain* [2002] 3 CLJ 766; [2002] 3 MLJ 657 made his observation at p. 774 (CLJ); p. 665 (MLJ) of this decision:

> … Ini kerana kedudukan Islam dalam Perlembagaan Persekutuan adalah *berlainan daripada kedudukan agama-agama lain. Pertama, hanya Islam sebagai satu agama, yang disebut namanya dalam Perlembagan Persekutuan, iaitu sebagai 'agama bagi Persekutuan'* (the religion of the Federation) – Perkara 3(1).
>
> Kedua, Perlembagaan itu sendiri memberi kuasa kepada Badan Perundangan Negeri (bagi Negeri-Negeri) untuk mengkanunkan Hukum Syarak dalam perkara-perkara yang disebut dalam Senarai II, Senarai Negeri, Jadual Kesembilan Perlembagaan Persekutuan (Senarai II). Selaras dengan kehendak Senarai II itu, Akta Mahkamah Syariah (Bidang Kuasa Jenayah} 1965 (Syariah Courts (Criminal Jurisdiction) Act 1965) (Akta 355/1965) dan berbagai-bagai enakmen (untuk Negeri-Negeri) termasuk yang disebut dalam penghakiman ini, telah dikanunkan.
>
> (emphasis added)

[55] More recently, this court in *ZI Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor; Kerajaan Malaysia & Anor (Intervener)* [2015] 8 CLJ 621; [2016] 1 MLJ 153 had similarly stated that:

> In conclusion, we wish to highlight that a Muslim in Malaysia is not only subjected to the general laws enacted by Parliament but also to the state laws of religious nature enacted by Legislature of a state. … Taking the Federal Constitution as a whole, it is clear that it was the intention of the framers of our Constitution to allow Muslims in this country to be also governed by Islamic personal law. Thus, a Muslim in this country is therefore subjected to both the general laws enacted by Parliament and also the state laws enacted by the Legislature of a state.

[56] It is also for that reason that the Legitimacy Act 1961, which governs the legitimisation of children born out of wedlock excludes its application to Muslims. Section 3(3) of the Law Reform (Marriage and Divorce) Act 1976 stipulates this exclusion.

[57] In the present case, both MEMK and NAW are Muslims and were married under Islamic law, and the birth of the child occurred in Johor. Thus, they are subjected to Islamic law as found in the State of Johor.

[58] It is known and beyond doubt or dispute that an illegitimate Muslim child cannot be ascribed to the name of his father in Islam. This is made manifest when almost every legislation on the subject in the enactment of each State of Malaysia contains this clear injunction. The respondents here are subjected to s. 111 of the Islamic Family Law (State of Johor) Enactment, 2003 (The Johore Family Law Enactment) is clear on that prohibition when it provides for the following:

Ascription of paternity

111. Where a child is born to a woman who is married to a man more than six *qamariah* months from the date of the marriage or within four *qamariah* years after dissolution of the marriage either by the death of the man or by divorce, and the woman not having remarried, the nasab or paternity of the child is established in the man, but the man may, by way of *li'an* or imprecation, disavow or disclaim the child before the Court.

[59] Similar provision prevails in all other legislations of the States of Malaysia on Islamic family laws, such as Kedah, Kelantan, Melaka, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Sabah, Sarawak, Terengganu as well as the Federal Territories.

[60] Before going any further, we cannot lose sight of the fact that the respondents' application in the judicial review application was to quash the decision of the DGNR dated 8 May 2015, for refusing to correct the information in the Birth Register of the child. The information that MEMK wanted to be corrected was the word "Abdullah", which he sought to be replaced with "MEMK". In this regard, I agree that the DGNR had correctly rejected the respondents' application for the child to be ascribed to him as "bin MEMK" not only due to the non-application of s. 13A but he also took into account the above-written law applicable to the respondents in the State legislation.

[61] We must not overlook what a judicial review entails. It has often been stressed that unfettered discretion is a contradiction in terms; it is another name for arbitrariness and has no place in public law (see *Minister Of Labour & The Government Of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195; [1990] 2 MLJ 9 at 12; *YB Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia* [1999] 2 CLJ 471; [1999] 2 MLJ 337 at 359). In the celebrated words of Azlan Shah LP in *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 at 148:

> Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene.

[62] The general principles on the review of Executive discretion by the court are found in the judgment of Lord Greene MR in *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223. As summarised by Hashim Yeop Sani CJ (Malaya) in *Minister of Labour, Malaysia v. Lie Seng Fatt* (*supra*) at p. 199 (CLJ); p. 12 (MLJ):

A ... so long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the court unless he had mis-directed himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates against the object of the statute.

B **[63]** The authority exercising the discretion "must act *bona fide*, fairly, honestly and honourably" (see *Government of Malaysia & Ors v. Loh Wai Kong* [1979] 1 LNS 22; [1979] 2 MLJ 33 at 36). If the discretion conferred by a statute is exercised in a way so as to defeat the policy and object of that statute, the courts would interfere with the discretion; where the authority has given insufficient weight to proper considerations, or was influenced by C improper considerations would be another area meriting the court's intervention (see *National Union of Hotel, Bar and Restaurant Workers v. Minister of Labour and Manpower* [1980] 1 LNS 50; [1980] 2 MLJ 189 at 191).

[64] This being a case of a judicial review application, the simple question D confronting the court is, can the DGNR be said to be unreasonable in recognising the applicable written law to the respondents and should his decision be impugned by the court?

[65] In dealing with this particular question and on the application of personal law, there are two aspects that I need to address:

E (i) First, whether the DGNR was correct in rejecting the application to ascribe the name of the first respondent of his natural father.

(ii) Secondly, whether the decision of the DGNR to ascribe "bin Abdullah" is supported by legal or factual basis.

F **[66]** Applying the above acceptable general principle in a judicial review exercise, it cannot be said that the DGNR in rejecting the application of the respondents was unreasonable. His decision not to allow the respondent child's full name as "… bin MEMK" was clearly substantiated by the law applicable to the respondents. Furthermore, such written law is not G inconsistent with any of the provisions in the BDRA. The DGNR's decision cannot therefore be impugned on reasons of unreasonableness.

[67] The act of the National Registration Department (NRD) in employing Islamic law in the exercise of its duty and power is not new in our legal system. In *Lina Joy lwn. Majlis Agama Islam Wilayah Persekutuan & Yang Lain* H [2007] 3 CLJ 557; [2007] 4 MLJ 585 the NRD had done the same. The same issue was before this court. In that case, the main issue was whether the NRD had acted in accordance with law when it rejected Lina Joy's request to remove the word "Islam" from her National Registration Identity Card ("NRIC"). Lina Joy in applying to remove the word "Islam" from her I NRIC, tendered a statutory declaration to support her application that she was no longer a Muslim. The NRD refused to accept her application on the ground that it was incomplete without an order of Syariah Court to the effect that she had renounced Islam.

[68] It was found and held in *Lina Joy* that the refusal of the NRD to act without the approval of religious Islamic authority was reasonable, because a renunciation of Islamic faith is a matter relating to Islamic law. Thus, it was held to be reasonable for the NRD in that case to impose the condition that a certificate or declaration or order from the Syariah Court that Lina Joy had renounced Islam must be produced. As such, this court found that the imposition of such a condition was not an unreasonable decision. That remains the legal position of this court and we see no reason to depart from the same.

[69] Quite similar to the present case, the DGNR in my view had acted reasonably in referring to Islamic law in performing registration of birth of an illegitimate Muslim child. It follows that the DGNR's decision in refusing to ascribe the father's name MEMK to the child was in compliance with the law and is not tainted with illegality, irrationality or procedural impropriety such as to warrant interference by the courts.

"bin Abdullah issue"

[70] The second aspect of question 1 is on the application of the National Fatwa which requires a Muslim child to ascribe to "bin Abdullah". In deciding that the child should carry his name as "bin Abdullah", the DGNR relied on two decisions of Mufti/Scholars of Islamic Jurisprudence through Muzakarah Jawatankuasa Fatwa Majlis Kebangsaan (National Fatwa Committee) dated 28 January 1981.

[71] The Islamic jurisprudence is clear. Whilst the Shariah prohibits ascription to paternity the *Fiqh* is not consensus on the ruling that all illegitimate children must be "bin or binti Abdullah". The next issue confronting us is therefore whether the DGNR, in deciding as he did, had taken into account irrelevant matters, when he ascribed the child's name to "bin Abdullah". In other words, can the DGNR be said to have acted unreasonably in this instance.

[72] There are various views on how an illegitimate child be named. The variation of the *Fiqh* or juristic opinions on this particular issue is demonstrated in the *fatwa* made by various State Fatwa Committee as well as the National Fatwa Committee.

[73] Typically under the State legislation on the administration of Islamic laws, there is always a provision that allows a *fatwa* to be made or deliberated on an unsettled or controversial issue. Such a ruling or opinion, generally speaking, becomes law and binding, upon it been gazetted (see as an example s. 34 of the Administration of Islamic Law (Federal Territories) Act 1993). This kind of provision is made on the recognition that there are often differences in views on *Fiqh* but not in Shariah. In this particular case, the Shariah on ascribing an illegitimate child to the natural father is clearly prohibited. The *Fiqh* on what such an illegitimate child be ascribed to is, however quite unsettled. In Islamic jurisprudence, the Government of the

day, is responsible to decide which amongst the view should be applicable to the *ummah*, in line with the circumstances and local communities. This is known as the doctrine of Siasah as Shariah in the Islamic jurisprudence.

[74] The *Fiqh* on naming an illegitimate child is based on juristic opinion which differs from one to another. This explains why there are bound to be a divergence in view on the *Fiqh* which we are now dealing with ie, whether an illegitimate child must be named as "bin Abdullah". Due to the divergence, the State law may adopt the appropriate *fatwa* in each State in cognizance of its local circumstances.

[75] The opinion of the National Fatwa Committee or a *fatwa* becomes law in the State of Johor and would be legally binding only if it is gazetted in the State *Gazette* under s. 49 of the Administration of the Religion of Islam (State of Johor) Enactment 2003 (Enactment No 16 of 2003). That Enactment requires that a fatwa becomes law and only has the force of law upon gazetting and a provision on the procedure of making a *fatwa* is articulated in s. 48. Under s. 49, it further provides on how a *fatwa* becomes law and binding on the Muslim when it says:

> 49(1) Upon its publication or being informed, a *fatwa* shall be binding on every Muslim in the State of Johor as a dictate of his religion and it shall be his religious duty to abide by and uphold the *fatwa*, unless he is first permitted by the Fatwa Committee to depart from the *fatwa* in accordance with *Hukum Syarak*.
>
> (2) A *fatwa* shall be recognised by all courts in the State of Johor of all matters laid down therein.

[76] Section 52 deals with "Adoption of advice and recommendation of the National Fatwa Committee". The section provides that:

> 52(1) The Fatwa Committee may adopt any advice and recommendation of the National Fatwa Committee which affects any act or observance which has been agreed upon by the Conference of Rulers as an act or observance which extends to the Federation as a whole pursuant to Article 38(2)(b) of the Federal Constitution.
>
> (2) The advice or recommendation adopted by virtue of subsection (1) shall be deemed to be a *fatwa* and section 48, except subsection 48(7), shall apply thereto.
>
> (3) A *fatwa* published in the *Gazette* shall be accompanied by a statement that the *fatwa* is made under this section.

[77] There are various *fatwas* issued on the naming of an illegitimate child, or how an illegitimate child should be named. In a *fatwa* gazetted and made in accordance with s. 34 of the Administration of Islamic Law (Federal Territories) Act 1993, it states in the Federal Gazette No. PU(B) 446 of 2017 in para. 2 that:

Anak tidak sah taraf dalam perenggan 1 –

(a) Boleh dinasabkan, iaitu dibinkan atau dibintikan kepada –

(i) nama ibunya;

(ii) nama datuk *wa in'alaw* (dan ke atas) sebelah ibunya;

(iii) nama "Abdullah"; atau

(iv) mana-mana nama *asma'ul-husna* yang hendaklah dimulai dengan nama "Abdul" sebelum nama *asma'ul-husna* itu.

From the above, and in the case of the Federal Territory, an illegitimate child may be named as "bin" any of the persons enumerated in (a) (i) to (iv) above.

[78] In Perlis, the *fatwa* was gazetted by the *Warta* Kerajaan Jil. 56 on 17 January 2013, that an illegitimate child can be named or "bin" of his biological father. That *fatwa* states that:

Anak yang lahir kurang 6 bulan selepas ibunya berkahwin, boleh dibinkan kepada suami ibunya, kecuali jika dinafikan oleh si suami.

[79] The *fatwa* in Pulau Pinang as gazetted in 2003 is:

Anak tak sah taraf samada diikuti dengan perkahwinan pasangan itu atau tidak hendaklah dibinkan/dibintikan kepada "Abdullah".

[80] In Kedah the gazetted *fatwa* is:

Anak Tidak Sahtaraf tidak boleh dinasabkan kepada lelaki sama ada lelaki yang menyebabkan kelahirannya atau yang mengaku menjadi bapa kepada anak tersebut. Oleh itu, mereka tidak boleh mewarisi antara satu sama lain, tidak boleh menjadi mahram dan bapa tersebut tidak boleh menjadi wali kepada anak tersebut.

[81] In Negeri Sembilan, the gazetted *fatwa* pursuant to Administration of Islamic Law (Negeri Sembilan) Enactment 1991 provides:

Jika seorang bayi itu dilahirkan kurang 6 bulan daripada tarikh akad nikah maka anak tersebut haram dinasabkan kepada suami ibunya atau lelaki yang menyebabkan kehamilan anak tersebut.

[82] The national-level *fatwa* body's stand is that illegitimate children have to be named "bin" or "binti" Abdullah regardless of whether his birth was followed by their parents' marriage.

[83] In citing and stating the various opinions or *fatwa* above, I am not making any decision as to the correctness or otherwise of any of them. It is to demonstrate a point that, there are differences of views on the *Fiqh* of how an illegitimate child can be named. These differences in view in *Fiqh* is acceptable in the Islamic jurisprudence. It may be due to the differences of views in the *Fiqh* such as this, that in the State Legislative a particular *fatwa* is only binding as the law only if it is adopted and gazetted as one. This then would give the relevant authorities in the State to choose which of the views is best suited to the people in that State.

[84] As no *fatwa* on how to name an illegitimate child is gazetted in Johor, I am of the view that the DGNR cannot unnecessarily impose the *fatwa* of the National Fatwa Committee on the respondents. The National Fatwa can only apply to the State of Johor by virtue of s. 52(1) which I had earlier referred to.

[85] Thus, in imposing the *fatwa* of the National Fatwa Committee without adhering to s. 52, the DGNR had, therefore, usurped the power or the authority given to the Fatwa Committee of Johor in the imposition of "bin Abdullah" on the first respondent. Not only that, his act was inconsistent with s. 47 because only the Royal Highness the Sultan of Johor must assent to the publication of a *fatwa*. Since the Fatwa Committee of Johor had not adopted this *fatwa* of the National Fatwa Committee, it is not for the DGNR decide that the *fatwa* of the National Fatwa Committee is the one applicable to the respondents.

[86] I, therefore, agree with the respondents that the DGNR has no basis in law to impose the naming of "bin Abdullah" in this case and such a decision of the DGNR is subject to be impugned. I, therefore, answer question 1 in the following way: In performing registration of births of Muslim children, the DGNR may rely on Islamic law applicable to the person.

[87] Now on question 2, whether the civil court may determine questions or matters on the legitimacy of Muslim children in respect of naming and ascription of paternity?

There is no necessity to deal with question 2 since I have highlighted numerous times in my judgment that the legitimacy of the child under Islamic law was never an issue in dispute.

Notation On Section 13

[88] The respondents in their judicial review application sought to remove the notation "Permohonan Seksyen 13" on the ground that it is discriminatory against illegitimate children. However, it has been the bone of contention of the respondents' case that the DGNR's statutory duty under the BDRA, is purely to register births and deaths in the States of Peninsular Malaysia. To argue now that noting the true fact of birth is contradictory and discriminatory then it countered the argument that the DGNR cannot take into account any other matters in registering the birth of a child. And if the birth certificate is purely a record of birth, and not an evidence or determination of legitimacy nor a determination of the status of a child – in that same token when it registers the true fact of birth it cannot be argued to be discriminatory. I am not able to appreciate the argument on discrimination as that notation is purely a true reflection of the record of the birth of the child.

[89] Hence, I agree with the argument by the appellants that the notation stating it as an application pursuant to s. 13 is a true reflection of the fact surrounding the registration of birth of the first respondent. That notation cannot be held to be discriminating when it only gives a true reflection of the surrounding fact.

[90] In the result, I allow the appeal of the appellant in part and set aside the orders made by the Court of Appeal. I hereby make a consequential order for the DGNR to remove "bin Abdullah" from the birth certificate of the first respondent. The name of the first respondent without "bin Abdullah" shall so remain. This is also in line with the application made by the respondents in his application dated 10 November 2015 as found in the Appeal Records Jilid 1 at p. 171.

[91] My learned brothers Azahar Mohamed CJM, Mohd Zawawi Salleh FCJ and Idrus Harun FCJ had read this judgment in draft and had expressed their agreements on the reasons and the conclusion arrived in this judgment.

David Wong Dak Wah CJ (Sabah & Sarawak) (dissenting):

Introduction

[92] This is an appeal against the decision of the Court of Appeal wherein the court sustained the reliefs sought by the respondents, namely:

(i) a *certiorari* quashing the impugned decision, *to wit*, the appellants' decision dated 8 May 2015 rejecting the respondents' s. 27(3) application to have "bin Abdullah" corrected to the second respondent's name; and

(ii) a *mandamus* compelling the appellants to correct the first respondent's birth certificate to bear the second respondent's surname and not the name "bin Abdullah".

[93] The appellants obtained leave to appeal from this court and the leave questions read as follows:

(i) Whether in performing the registration of births of Muslim children, the Register of Births and Deaths may refer to and rely on sources of Islamic law on legitimacy?

(ii) Whether the civil court may determine questions or matters on the legitimacy of Muslim children in respect of naming and ascription of paternity? and

(iii) Whether s. 13A of Act 299 (the BDRA 1957) applies to the registration of births of Muslim children enabling the children to be named with the personal name of a person acknowledging to be the father of the children?

A **Background Facts**

[94] The factual matrix is undisputed, and it is this. The first appellant is the National Registration Department of the country. The second appellant is its Director-General. The third appellant is the Government. Ignoring procedural niceties, this in substance is the Federal Government's appeal.

B

[95] All parties are on common ground that the respondents' names shall not be published in accordance with s. 15(2) of the Courts of Judicature Act 1964 ('CJA'). The first respondent is a child. The second and third respondents are married and are respectively the first respondent's father and mother.

C

[96] The intervener is the Religious Authority of the State of Johor.

[97] Traditionally, all children born during the continuance of a valid marriage between his mother and any man are conclusively presumed to be the legitimate child of that man. See: s. 112 of the Evidence Act 1950. The
D provision, being one of general application, must yield to specific law. Section 112 of the Evidence Act 1950 therefore has no application as far as Muslims are concerned. Family law, including the legitimacy of children, is governed strictly by State law. See: Federal Constitution, Ninth Schedule, List II ('State List'), item 1.

E

[98] As the respondents reside in Johor, s. 112 of the Evidence Act 1950 is displaced by s. 111 of the Islamic Family Law (State of Johor) Enactment 2003 ('Johor Enactment 2003') which provides as follows:

> Where a child is born to a woman who is married to a man more than
F six *qamariah* months from the date of the marriage or within four *qamariah* years after dissolution of the marriage either by the death of the man or by divorce, and the woman not having remarried, the nasab or paternity of the child is established in the man, but the man may, by way of *li'an* or imprecation, disavow or disclaim the child before the Court.

[99] In the context of this appeal, the first respondent was born five
G *qamariah* months and 27 days into the marriage – a few days short of being born legitimate. Thus, the fact that first respondent is illegitimate is a non-issue and both the courts below proceeded on the same assumption.

[100] The subject of this appeal is as follows. The first respondent's birth
H was registered two years late. This was not an issue. What was in issue is when the appellants, on 6 March 2012, issued him his birth certificate with his "surname" identified as "bin Abdullah".

[101] This was not what the respondents had themselves expressly requested. What was requested was that the father's name be so registered.
I For clarity, the appellants approved the request to register the second respondent as the first respondent's father. But, instead of ascribing the former's name to the latter's, the appellants instead ascribed to him "bin Abdullah".

[102] Two years later, on 2 February 2015, the respondents applied under s. 27(3) of the Births and Deaths Registration Act 1957 ('BDRA 1957') for the first appellant to delete "bin Abdullah" and substitute it with the second respondent's name ie, his birth father's name. The appellants rejected this application *vide* a letter dated 8 May 2015 on the grounds that the first respondent was born illegitimate ('impugned decision').

[103] It seems quite clear that the impugned decision was premised effectively on two *fatwas* (religious edicts) issued by the National Fatwa Committee in the years 1981 and 2003 ('the two *fatwas*'). The two *fatwas* essentially unequivocally proclaim that any child born less than six *qamariah* months from the date of marriage is illegitimate. Further, such child may not be given the name of his birth father (among other things not strictly relevant to this appeal). In any event, the appellants claim their rejection was done in accordance with Islamic law.

[104] In response to the rejection, the respondents filed an application for judicial review challenging the first and second appellants' impugned decision. The High Court found against the respondents and dismissed their action.

[105] The respondents appealed. The Court of Appeal agreed with them and accordingly allowed their appeal and set aside the decision of the High Court granted reliefs as mentioned earlier in para. [92].

Decision

[106] From my reading of the appeal record and the submissions of respective counsel in the context of the leave questions, there is only one issue requiring our answer summarised as follows:

> Whether the Appellants were correct in law by not ascribing the 2nd Respondent's name to the 1st Respondent as prayed for in the application by the Respondents pursuant to section 27(3) of the BDRA?

[107] At this juncture, it would not be inappropriate to remind myself of the legal principles which are applicable and must be applied in this appeal. The three basic tenets of administrative law and judicial review are illegality, irrationality and procedural impropriety. The law here is clear and that is administrative bodies, being creatures of statute only have such powers conferred on them by law (see the *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135, at p. 148).

[108] In recent times we have the judgment in the case of *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145; [2018] 1 MLJ 545. There, the question was whether the decision of the Registrar of Muallafs of Perak was correct in law in allowing the conversion of children without the benefit of consent from both their parents. This court declared the decision null and void and struck it down. The

A Registrar's act was an administrative act. If it was unlawfully exercised, it had to be so declared and set aside. And, that was indeed the inevitable outcome. This principle is no different and no less alien in this case.

[109] The instructive observation of Zainun Ali FCJ in the context of this appeal was as follows at para. [118] (CLJ); para. [124] (MLJ) of *Indira Gandh*i (*supra*):

B

> Thus it is clear to us that the boundaries of the exercise of powers conferred by legislation is solely for the determination by the courts. If an exercise of power under a statute exceeds the four corners of that statute, it would be *ultra vires* and a court of law must be able to hold it as such ...

C

[110] With that I now deal with the aforesaid issue which requires an analysis of the law, namely the BDRA 1957 and its application to the facts.

[111] My analysis turns on two crucial questions.

D

(i) Firstly, whether the application of the "bin Abdullah" convention under Islamic law by the first appellant is permitted by the BDRA 1957; and

(ii) Secondly, if the convention is not permitted specifically by the BDRA 1957, whether it may be supported by another provision of the law; or Islamic law generally.

E

Whether The BDRA 1957 Permits The Bin Abdullah Convention

[112] Section 27(3) of the BDRA 1957 provides:

F

> Any error of fact or substance in any register may be corrected by entry (without any alteration of the original entry) by the Registrar-General upon payment of the prescribed fee and upon production by the person requiring such error to be corrected of a statutory declaration setting forth the nature of the error and the true facts of the case, and made by two persons required by this Act to give information concerning the birth, still-birth or death with reference to which the error has been made, or in default of such persons then by two credible persons having knowledge to the satisfaction of the Registrar-General of the truth of the case; and the Registrar-General may if he is satisfied of the facts stated in the statutory declaration cause such entry to be certified and the day and the month and the year when such correction is made to be added thereto.

G

[113] The position of the respondents is simply this. The appellants erred in fact and law when they rejected the respondents' application to register the second respondent's name as being the first respondent's patronymic surname considering that the second respondent was accepted to be the first respondent's biological father in the latter's birth certificate.

H

[114] Whether the position of the respondents is correct in law requires this court to determine the correct interpretation of two provisions of the BDRA ie, s. 13 and 13A thereof. It is the interpretation and application of these provisions which, in my view, forms the substance of this appeal.

I

[115] Section 13 of the BDRA 1957 reads:

> Provisions as to father of illegitimate child
>
> 13. Notwithstanding anything in the foregoing provisions of this Act, in the case of an illegitimate child, no person shall as father of the child be required to give information concerning the birth of the child, and the Registrar shall not enter in the register the name of any person as father of the child except at the joint request of the mother and the person acknowledging himself to be the father of the child, and that person shall in that case sign the register together with the mother.

[116] Section 13A in turn provides:

> **Surname of child**
>
> 13A(1) The surname, if any, to be entered in respect of a legitimate child shall ordinarily be the surname, if any, of the father.
>
> (2) The surname, if any, to be entered in respect of an illegitimate child may where the mother is the informant and volunteers the information, be the surname of the mother; provided that where the person acknowledging himself to be the father of the child in accordance with section 13 requests so, the surname may be the surname of that person.

[117] Section 13 is quite clear in its wording in regard to illegitimate children. The words simply provide that the father of the illegitimate child is not in law required to give information relating to the birth of the child nor that his name be ascribed to the child unless he acknowledges himself to be the father of the child and signs the register jointly with the mother.

[118] In the case before us, there is no dispute that the second respondent acknowledges himself as the father of the first respondent and that he together with the third respondent (the mother) had made the application to register the birth of the same, thus s. 13 of BDRA had been fully complied with. And, in accordance with s. 13, the appellants duly registered the second respondent as the father of the first respondent.

[119] Having registered the second respondent as the first respondent's father, the appellants however ascribed the latter the surname "bin Abdullah". This then brings into play the primary issue whether s. 13A of BDRA is applicable to the facts here. Section 13A relates to the ascription of surnames to the citizens of this country by the first appellant.

[120] The word "surname" is not defined anywhere in our statute books, hence no guidance is afforded to us. *The Oxford's Advance Learner's Dictionary* (7th edn), at p. 1545 however defines "surname" to mean:

> a name shared by all the members of a family (written last in English names)

[121] The concept, as far as the layman is concerned, is not one difficult to comprehend. Suppose a man's name is John Smith. His surname would be "Smith". Once married, his wife will also carry the surname "Smith" and she may be styled Mrs. Smith. Their legitimate children will also, under normal circumstances, carry the same surname. So, John's son, assuming his name is James will be "James Smith".

[122] The stand of the appellants and the intervener is simply that s. 13A of the BDRA 1957 is inapplicable to this case premised on the ground that the second respondent's name is not a surname. They thus submitted that the second respondent's name is merely a personal name of person acknowledging himself to be the father.

[123] In response, learned counsel for respondents submits that "surname" ought to include "patronymic surname". To them, in a multi-religious and multi-racial Malaysia with diverse naming practices, the meaning of the word "surname" must necessarily be enlarged and interpreted purposively otherwise Muslims, certain Indian or Sri Lankan ethnic groups, natives of Sabah and Sarawak and many others would be excluded from the application of s. 13A of the BDRA 1957.

[124] In construing a statutory provision, the first and foremost rule of construction has always been the literal rule, that is, courts must interpret legislation according to the clear words of the statute unless the language is unclear or ambiguous. In such case, the courts ought to give meaning to the legislation in accordance with its object, purpose and prevailing legislative intent. Here, in view of the fact that there is no definition of the word "surname" it can be said that there is a patent ambiguity and as such the courts are entitled to utilise other rules of construction to interpret the word "surname". One such rule of construction is that the courts must avoid a construction which produces an absurd result or an "unworkable" or "impractical result". (see *R (on the application of Hasan) v. Blackfriars of Crown Court* [2006] 1 All ER 817).

[125] The fact of the matter is that with the exception of the Chinese race (for instance), a vast majority of Malaysians, including Muslims, do not have "surnames". If we were to adopt the strict construction afforded by the appellants and the intervener, it would mean rendering otiose s. 13A of the BDRA 1957. That, in my view, could not have been the intention of Parliament absent clear language to that effect.

[126] Further, reading "surname" to include "patronymic surnames" would be in accord with the object and purpose of the BDRA 1957. Its long title stipulates that the BDRA 1957 is an act "relating to the registration of births and deaths". It would hardly accord with logic to read the word "surname" in the restrictive manner proposed by the appellants and the intervener and to deny a vast majority of Malaysians a surname if that phrase includes "patronymic surnames".

[127] The word "patronymic" according to the *Oxford Dictionary* (*supra*) at p. 1111 is defined as follows:

> a name formed from the name of your father or a male ancestor, especially by adding something to the beginning or the end of their name ...

[128] Traditionally, a patronymic is described as attaching to a person's given name, their father's name along with a pre-fix delineating the two names. At least one author notes that in Germanic countries, the use of surnames actually arose from patronymics. This is what one academic, John Serensen of the University of Copenhagen, had to say in a lecture delivered in 1982. See: John Serensen, *'Patronymics in Denmark and England' The Dorothea Coke Memorial Lecture in Northern Studies (20 May 1982) delivered at University College London*, at p. 3:

> There are three main ways in which patronymics have been formed on Germanic ground: as derivative patronymics, in which a derivative ending is attached to the father's name, eg, Wulfung 'Wulf's son as inflexional patronymics, in which the father's name is added in a nominative form or a genitive form: William or Williams 'William's son; and as compound patronymics, in which the father's name is compounded with a word for 'son' eg, Williamson, Wilson 'William's son. **Several of these patronymics survive to the present day in fossilised form as surnames.**
>
> (emphasis added)

[129] Reverting to my earlier hypothetical example of John Smith, he would in ordinary parlance be referred to as Mr Smith. Assuming a man bears the name Ali bin Abu, it would be incorrect to style him as Mr Abu as that would be calling him by his father's name. In most Western countries, this awkwardness would be overcome simply by referring to him as Mr bin Abu. The word "bin" is an Arabic term meaning "son of". It is much like the example of 'Williamson' referenced by *Sorensen* (*supra*). The female equivalent of 'bin' is "binti" – meaning daughter of. So, Abu's hypothetical daughter, Aminah binti Abu, may be referred to as Ms binti Abu.

[130] The example is no different from non-Muslims who also adopt the patronymic practice. An Indian man by the name of X anak lelaki Y would simply be called Mr X anak lelaki Y. Any native of Sabah or Sarawak by the name of A anak B would either be Mr or Ms A anak B. It therefore follows that a person's father's name coupled with the prefixes 'bin'/'binti' or 'anak lelaki/perempuan' or simply 'Anak', collectively constitute a person's patronymic surname.

[131] Reading ss. 13 and 13A of the BDRA 1957 together, a father of an illegitimate child who wishes to have his son or daughter carry his surname is certainly not precluded from having that done by the language of the BDRA 1957. It herefore agree with the respondents' contention that "surname" in s. 13A of the BDRA 1957 includes a "patronymic surname".

[132] In rebutting the contention of the respondents, the appellants and intervener argue that patronymic surnames cannot be applied to Muslims premised on Islamic law and legal principles. I will address this argument in due course.

[133] But first, I find it necessary to highlight that even the drafting history of the amendment to the BDRA 1957 to include s. 13A exposes some degree of confusion among our legislators. This confusion is confirmed by my reading of the Dewan Rakyat Hansard on 1 April 1975 during the second and third readings of what later became the Births and Deaths Registration (Amendment) Act 1975 (Act 296). The relevant Minister explained the rationale for the present s. 13A of the BDRA 1957 which was then cl. 6 of the Bill as follows (at p. 3733):

> Fasal 6 bertujuan memasukkan nama keluarga (seh) bagi anak yang dilahir di luar nikah.

[134] If we stop reading there, it would seem that Parliament had only intended the provisions of s. 13A to apply to surnames of Malaysians of Chinese descent as apparent in the word 'seh'. However, a broader and more wholesome reading of the Parliamentary Hansard reveals that despite what the explanatory statement of the Bill states, Parliament intended that s. 13A should apply to all Malaysians irrespective of race. This is the root of the confusion and there is two pieces of evidence to support this conclusion.

[135] The first, more general proof, is this. In the same Dewan Rakyat Hansard, the relevant Minister explained that the entire bundle of amendments proposed in the Bill (including s. 13A) was for the benefit of all Malaysians. This is what he said at p. 3732:

> Berasaskan kepada pengalaman dalam melaksanakan berbagai peruntukan Ordinan Sijil Beranak dan Mati 1957 yang terpakai sekarang adalah didapati bahawa pindaan perlu dibuat kepadanya untuk mengemas dan melancarkan lagi pentadbiran dari segi keselamatan sijil-sijil beranak dan mati **di samping memberikan kemudahan kepada rakyat untuk membuat pendaftaran kelahiran dan kematian.** (emphasis added)

[136] The next proof which specifically represents Parliamentary intention that s. 13A ought to apply to all Malaysians and not just those of Chinese descent is manifest in a distinct query by one member of the Senate to the relevant Deputy Minister on 18 April 1975 during second and third reading of the same Bill in the Dewan Negara. This is how the query was put, at pp. 1436-1437:

> Yang ketiga, anak yang tidak berbapa. Dalam Akta ini ada menyebutkan anak yang lahir tidak tahu siapa ayahnya; bukan ibu sebab mustahil anak tiada ibu. Anak yang lahir tidak tentu ayahnya atau anak yang terjumpa, siapa yang hendak dibinkan anak itu pada segi Islam ataupun luar nikah dengan siapa hendak dibinkan. Menurut Islam anak itu dibinkan dengan ibu yang menjadinya tetapi kadangkala gunakan nama orang pak sanggup. Dia kata dia boleh jadi bapa dengan syarat beri sekian-sekian, maka anak

itu bernama Abdullah bin bapa yang diberikan sekian-sekian. Pada segi Islam bapa ini tidak betul. Melalui kad pengenalannya anak ini akan dapat hak pusaka daripada bapa yang diakui. Perkara ini patut Kementerian membuat satu cara macam mana ada dibinkan kalau ada anak tidak ada bapa dan juga anak terjumpa di tempat yang tidak tentu.

[137] And, this is how the relevant Deputy Minister moving the Bill responded:

Selain daripada anak yang tidak tentu bapanya tadi, anak luar nikah dan sebagainya, soal menukarkan kad pengenalan ini adalah berdasarkan surat beranak kerana kad pengenalan itu dikeluarkan setelah anak berumur 12 tahun berdasarkan surat beranaknya, jadi tidak timbul masalah. Sesiapa sahaja yang bin yang ditulis dalam surat beranak maka itulah nama, bin yang dimasukkan dalam kad pengenalan.

[138] The above interchange essentially indicates Parliament's intention of not discriminating between Muslims and non-Muslims. Any person whose father's name was ascribed to him in his birth certificate would also be the same name be used in his national identity card (also commonly known as MyKad). And here, it must be re-emphasised that appellants did register the second respondent as the first respondent's father.

[139] To summarise, the question put was that it was unclear how a Muslims child would be named if he were to born illegitimate and it was suggested that the Home Ministry should find a way to clarify this. The Minister's response was that the ascription of the name would be done in accordance with whom the father's name is in the birth certificate. The full name of the child, in every case, legitimate or illegitimate, would be named in exactly the same way.

[140] Section 13, which is the only other provision on illegitimate children, and which only deals with the registration of the father's name in the birth certificate, is alone insufficient to determine what the 'full name' of the child should be. Accordingly, s. 13 has to be read together with s. 13A(2) to determine how the child should be named. A person may agree to be registered as the father under s. 13, but he might not jointly agree with the mother to ascribe his name as the surname of the child under s. 13A. Reading ss. 13 and 13A of the BDRA 1957 in light of such overarching Parliamentary intention therefore supports the other principles of interpretation I cited earlier to arrive me at the following conclusions. First, "surname" under s. 13A was intended to include patronymic surnames and that second, s. 13A was intended to apply to all illegitimate children – Muslims or otherwise.

[141] By way of illustrations, the scenario would be this. If Y is the name of a child in any given case, it therefore follows that it would be lawful for the first appellant to ascribe "bin X" or "binti X" to that person's name. The qualification however is contained in s. 13A(2) of the BDRA 1957 itself in that "where the person acknowledging himself to be the father of the child in accordance with s. 13 requests so, the surname may be the surname of that

person". I expressly highlighted the words "that person" and "the father of the child" because they lead to one, and only one, conclusion. It is this. That the surname of the child, if a Muslim, must be "bin X" assuming that X is the name of his father. It cannot be "bin" anything else nor can it be "bin Abdullah" unless the person acknowledging himself to be the father is in fact named "Abdullah".

[142] As there is no other provision in the BDRA which supports the appellants' reliance on the "bin Abdullah" convention and based on the non-discriminatory nature of BDRA, there cannot be any reasonable suggestion that the illegitimate children of Muslims may be ascribed any surname other than their biological father's.

[143] In the circumstances, I am of the considered view that the appellants had acted in contravention of the clear provisions of the BDRA 1957 – specifically under s. 13A of the BDRA when the respondents' application under s. 27(3) of the BDRA 1957 was rejected.

[144] I will now turn to consider whether principles of Islamic law are applicable as far as the BDRA 1957 is concerned.

The Application Of Islamic Law To s. 13A Of The BDRA 1957

[145] Both the appellants and the intervener argue that they were justified in ascribing "bin Abdullah" as the first respondent's surname premised on the Islamic law naming convention. In this regard, it is submitted that the Court of Appeal had erred when it failed to recognise they were devoid of jurisdiction on issue relating on the legitimacy of Muslims as that is a matter for the Syariah Courts and thus, non-justiciable before the civil courts. Further, it is also submitted that Islamic law is the appropriate law and thus, the appellants were justified in applying it to justify the bin Abdullah convention.

The Jurisdiction Of The Civil Courts

[146] The rationale in which Court of Appeal armed itself with jurisdiction is simply on the basis that the impugned act is an administrative act, no more no less. This can be seen in para. [61] of its judgment:

> It needs to be emphasised that the appellants' application involved the administration of the civil law by the civil authority and not the administration of the *hukum syarak* by the religious authority. The matter before the second respondent was a simple and straightforward question of whether the second appellant, being a person duly and lawfully registered as the father of the first appellant under s. 13, was entitled, by virtue of s. 13A(2), to register the first appellant's surname in his name. This is a purely administrative function that has nothing to do with Islamic jurisprudence on legitimacy.

[147] The legitimacy of the first respondent is not an issue before us as it is common ground that the first respondent is in fact and in law an illegitimate child under Islamic law. We were also not called upon to determine the

distribution of anyone's estate or how, the first respondent's status as an illegitimate child factors in such distribution. I accept that these issues are well within the exclusive jurisdiction of the Syariah Courts.

[148] The issue before us is simply whether the appellants had acted within their statutory powers provided for in the BDRA 1957. It is an administrative law action which, as held in *Indira Gandhi* (*supra*), is well within the jurisdiction of the civil superior courts as part and parcel of our power of judicial review. This principle of law is presently well entrenched in this country's legal landscape.

May The Appellants Have Recourse To Islamic Law?

[149] There is little doubt that the first appellant in exercising his discretion to reject the application to amend the birth certificate had relied the two fatwas ie, the 1981 and 2003 fatwas. It is also contented that in the circumstances of this case, the law to be applied ought generally to be Islamic law.

[150] On the first contention, the appellants place reliance on the judgment of our apex courts in *Kamariah Ali v. Kerajaan Negeri Kelantan, Malaysia & Satu Lagi Dan Rayuan Yang Lain* [2002] 3 CLJ 766; [2002] 3 MLJ 657 and *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Yang Lain-Lain* [2007] 3 CLJ 557; [2007] 4 MLJ 585.

[151] This is what the Court of Appeal said of the two aforesaid cases:

> [58] The first case was cited for the proposition that in the absence of any determination by the Syariah Court that the first appellant is a legitimate child, the second respondent was right in relying on the documentation presented to him to determine the legitimacy of the first appellant.
>
> [59] The second case was cited for the proposition that since the second respondent was relying on the Islamic law on legitimacy to reject the second appellant's application, he had not acted unreasonably beyond logic or moral standard which no reasonable person who had directed his mind to the question to be decided could come to such decision.
>
> [60] With due respect, counsel's reliance on the two cases is misconceived In the first place, the question of the appellants having to go to the Syariah Court for a ruling or for a declaration that the first appellant is a legitimate child does not arise at all for the simple reason that they never disputed that the first appellant is an illegitimate child, unlike Lina Joy who denied that she was still a Muslim when applying to delete the word "Islam" from her identity card. The appellants' challenge was on the correctness in law of the second respondent's refusal to replace the surname "Abdullah" with the second appellant's name in the birth certificate of the first appellant.
>
> [61] It needs to be emphasised that the appellants' application involved the administration of the civil law by the civil authority and not the administration of the *Hukum Syarak* by the religious authority. The matter before the second respondent was a simple and straightforward question

A of whether the second appellant, being a person duly and lawfully registered as the father of the first appellant under s. 13, was entitled, by virtue of s. 13A(2), to register the first appellant's surname in his name. This is a purely administrative function that has nothing to do with Islamic jurisprudence on legitimacy.

B [62] In any event, even if the legitimacy of the first appellant had to be determined by reference to Islamic law, the second respondent had no jurisdiction nor the competence to decide on the matter, as decided by the Federal Court in *Lina Joy* (*supra*).

[63] The second respondent's jurisdiction is a civil one and is confined to the determination of whether the second appellant had fulfilled the C requirements of s. 13A(2) of the BDRA, which obviously covers all illegitimate children, Muslim and non-Muslim alike. For that purpose, he is not obligated to apply, let alone to be bound by a *fatwa* issued by a religious body such as the National Fatwa Committee.

[64] For him to do so would amount to an abrogation of his power under D the BDRA and surrendering it to the religious body. That would in effect be to take away the statutory right accorded to the second appellant by s. 13A(2) to have his name ascribed as the first appellant's surname in the birth certificate.

[65] Such abrogation of power will render s. 13A(2) of the BDRA E completely otiose and gives the impression that Parliament had enacted the provision in vain, a proposition that has no place in legislative interpretation. A *fatwa* or a religious edict issued by a religious body has no force of law unless the *fatwa* or edict has been made or adopted as Federal law by an Act of Parliament. Otherwise, a *fatwa* issued by a religious body will form part of Federal law without going through the F legislative process.

[152] These observations are succinctly clear and require no further elaboration from me.

[153] As for the other contention that Islamic law ought to be applied or to G prevail in this case, it is premised on the fact that the first respondent is a Muslim and hence is subject to Islamic law on legitimacy especially s. 111 of the Islamic Family Law (State of Johor) Enactment 2003 as the first respondent is a resident of Johor. Reliance was also placed on the case of *ZI Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor, Kerajaan Malaysia & Anor (Intervener)* [2015] 8 CLJ 621; [2016] 1 MLJ 153 where Raus Sharif H PCA (as he then was) delivering the judgment of the court said at p. 633 (CLJ); p. 164 (MLJ):

[31] In conclusion we wish to highlight that a Muslim in Malaysia is not only subjected to the general laws enacted by Parliament but also to the state laws of a religious nature enacted by the Legislature of a state. This I is because the Federal Constitution allows the Legislature of a state to legislate and enact offences against the precepts of Islam. Taking the Federal Constitution as a whole, it is clear that it was the intention of the framers of our Constitution to allow Muslims in this country to be

also governed by Islamic personal law. Thus, a Muslim in this country is therefore subjected to both the general laws enacted by Parliament and also the state laws enacted by the Legislature of a state.

[154] I agree with the Court of Appeal where it kept repeating throughout its judgment that the primary issue is not whether the first respondent is subject to both Federal and State laws that are religious in nature, which he is, as indeed all Muslims are in this country insofar as the legislative lists in the Federal Constitution allow.

[155] The primary issue, in the context of this case, is simply whether the first appellant was duty-bound by law to ascribe to the first respondent the second respondent's name in patronymic form in the Register where a request had been made by the second respondent for the appellants to do so.

[156] As for s. 111 of the Johor Enactment 2003 and any legal effect of any *fatwa* connected thereto, the Court of Appeal found that the Johor Enactment is State law and cannot override what is provided in BDRA especially s. 13A(2). As for the two *fatwas*, this what the Court of Appeal said:

[83] In any event, there is no evidence that the Johor Fatwa Committee established under s. 46(1) of the Administration of the Religion of Islam (State of Johor) Enactment 2003 ("the Johor Religion of Islam Enactment") has prepared and issued any *fatwa* on the issue of legitimacy of a child pursuant to s. 47, which provides:

> 47. Subject to section 51, the Fatwa Committee shall, on the direction of His Majesty the Sultan, and may on its own initiative or on the request of any person by letter addressed to the Mufti, prepare *fatwa* on any unsettled or controversial question of or relating to *Hukum Syarak*.

[84] Such *fatwa*, if prepared, will only be binding if it fulfils the requirements of s. 49 which stipulates as follows:

> 49(1) Upon its publication or being informed, a *fatwa* shall be binding on every Muslim in the State of Johor as a dictate of his religion and it shall be his religious duty to abide by and uphold the *fatwa*, unless he is first permitted by the Fatwa Committee to depart from the *fatwa* in accordance with *Hukum Syarak*.
>
> (2) A *fatwa* shall be recognised by all courts in the State of Johor of all matters laid down therein.

[85] There is also no evidence that the Johor Fatwa Committee has adopted the advice and recommendation of the National Fatwa Committee as provided by s. 52 of the Johor Religion of Islam Enactment which states:

> 52(1) The Fatwa Committee may adopt any advice and recommendation of the National Fatwa Committee which affects any act or observance which has been agreed upon by the Conference of Rulers as an act or observance which extends to the Federation as a whole pursuant to Article 38(2)(b) of the Federal Constitution.

A (2) The advice or recommendation adopted by virtue of subsection (1) shall be deemed to be a *fatwa* and section 48, except section 48(7), shall apply thereto.

(3) A *fatwa* published in the *Gazette* shall be accompanied by a statement that the *fatwa* is made under this section.

B **[157]** The above passage indicates a correct application of the law and I find no reason to depart from it.

[158] Further, it is my view that there is another reason that the argument of the appellants cannot stand, and it is this. The power of Parliament to make laws relating to the registration of births and deaths is provided in the C Federal Constitution, Ninth Schedule, List I ('Federal List'), item 12(a). That provision reads as follows:

12. Surveys, inquiries and research, including:

(a) census; registration of births and deaths; registration of D marriages; registration of adoptions other than adoptions under Islamic law or Malay custom; ...

[159] See also item 3(e) of the Federal List.

[160] The long title of the BDRA 1957 reveals quite clearly that it was made under the auspices of item 12(a). The BDRA 1957 is therefore, for all intents E and purposes, a Federal law dealing with a Federal subject-matter namely, the registration of deaths and births.

[161] The appellants and the intervener argue that permitting the first appellant to ascribe the second respondent's name to the first respondent will F effectively render him legitimate. This, they submit, would be in contravention of s. 111 of the Johor Enactment 2003. This is of course premised on the argument that under Islamic law, in the case of illegitimacy of a child, the father may not claim paternity of such child.

[162] On a cursory glance, this argument looks attractive by virtue of the G difference in language between s. 112 of the Evidence Act 1950 and s. 111 of the Johor Enactment 2003 respectively. The former provides that marriage is conclusive proof of "legitimacy" while the latter by the language of its marginal note, deals expressly with the "ascription of paternity".

[163] The appellants also argue that non-Muslims are governed by the H provisions of the Legitimacy Act 1961 but that when it comes to Muslims, there is nothing apart from the birth certificate and the law provided by the States relating to Islamic law, to prove that a child is legitimate or otherwise.

[164] To reconcile s. 111 of the Johor Enactment 2003 and s. 112 of the Evidence Act 1950, we must fall back on the fact that under our law, I legitimacy and paternity constitute two distinct concepts. On this issue, there is at least one case in point ie, the judgment of the Court of Appeal in *CAS*

v. MPPL & Anor [2019] 2 CLJ 454 which was affirmed by the Federal Court in *MPPL v. Anor v. CAS (02(f)-14-03-2018(W)* – 29 January 2019). The facts were these.

[165] The suit was an action by the plaintiff seeking a DNA test to determine the paternity of child C – a female. The plaintiff claimed that he was the father of child C and that she was born as a result of an affair he had with the first defendant. The child was born while the first defendant was married to her husband, the second defendant. At the High Court, the defendants argued that the plaintiff's suit was summarily determinable on a point of law under O. 14A of the Rules of Court 2012, *to wit*, that s. 112 of the Evidence Act 1950 conclusively presumed child C was the legitimate child of the defendants. Allowing the plaintiff's claim would effectively illegitimise child C. The High Court agreed with the defendants' arguments and held that an inquiry into child C's paternity would have the effect of illegitimising her and accordingly dismissed the plaintiff's suit on that point of law.

[166] The question before the Court of Appeal was whether that dismissal on that point of law was correct. It was held that legitimacy and paternity are two distinct concepts. Section 112 of the Evidence Act 1950 pertains exclusively to legitimacy. Thus, it remained open to the plaintiff to determine paternity. The Court of Appeal accordingly remitted the matter to the High Court for trial.

[167] In my view, the judgment of the Court of Appeal in that case was correct. On a broader note, the effect of separating paternity from legitimacy means that that child could potentially have two fathers – one in law and another in fact. A paternity test, if positive, would simply prove the fact that the plaintiff in that case was the biological father of the child. But by virtue of s. 112 of the Evidence Act 1950, the birth of child C during the valid marriage between the first and second defendants, legally, means that the second defendant is in law the legitimate father of child C. This is because under the said s. 112, the conclusive presumption of legitimacy may only be rebutted by proof of 'non-access'.

[168] Accordingly, under those circumstances, because initially it would appear that the second defendant, on the conclusive presumption that he is the father of child C, may register himself as her father. But if it is proved on the facts that the plaintiff is in fact the father, I cannot see the reason why the birth certificate ought not to be amended to indicate that the child's actual, meaning biological father, is the plaintiff.

[169] My reference to *CAS v. MPPL* case (*supra*) up to this point is merely my attempt to theoretically extrapolate its *ratio decidendi* to make sense of the applicable legal principles in this case.

[170] My analysis of the authorities including case law and the BDRA 1957 suggests that the birth certificate is not conclusive proof of its contents. Nothing in the BDRA 1957 suggests anything to that effect. Even in the Dewan Negara Hansard above-cited, it was indicated that the MyKad contains the same information contained in the birth certificate. As an analogy, reg. 24(1) of the National Registration Regulations 1990 expressly indicates that there shall be no presumption as to the truth of the contents of the national identity card. In any given case, the burden of proving the truth of the contents of an identity card, shall be on the person to whom such identity has been issued, or on any other person alleging the truth of such contents.

[171] Absent any written law to that effect as regards the birth certificate, it stands to reason that a birth certificate is not finally conclusive on its contents. This accords with the very purpose of item 12 of the Federal List which, in its opening words, was formulated for the purposes of surveys, inquiries and research. Reading those words in their plain meaning, together with the words "census" and "registration of births and deaths", it is clear that the purpose of the scheme of the BDRA 1957 is not to establish conclusively the facts of person's parentage, but merely as a repository for the information of the State.

[172] In the context of this appeal, s. 111 of the Johor Enactment 2003 expressly prevents the ascription of paternity. As elaborated earlier in this judgment, it would mean that that the second respondent is to that extent unable to even claim, in fact and in law, that he is the father of the first respondent. Does the existence of s. 112 of the Evidence Act and s. 111 of the Johor Enactment 2003 affect in any way the registration of births under the scheme of the BDRA 1957? Based on what I have held on the true intent of item 12 of the Federal List, it does not.

[173] This can be seen from s. 33(1) of the BDRA 1957 which simply indicates that when a person is to give information relating to an entry or a certificate of birth or a certificate of death, they need not furnish proof as evidence facts and particulars relating to such birth and death. It suffices if the supporting documents relating to the birth or death are lawfully recognised as an assertion of the fact sought to be entered under s. 33(2) of the Act. For completeness, I reproduce those provisions as follows:

> Entry in register as evidence of birth or death
>
> 33(1) Subject to the provisions of this section an entry or a Certificate of Birth or a Certificate of Death relating thereto purporting to have been duly certified under subsection 32(2) shall be received without further or other proof as evidence of such facts and particulars relating to such birth or death as are or were at the time of the making of such entry required by law to be set forth in such entry or certificate.

(2) An entry in a register or a Certificate of Birth or a Certificate of Death relating thereto, shall not be received as evidence under this section unless -

(a) the entry purports to be signed by some person professing to be the informant and to be such a person as might be required by law at the date of the entry to give to the Registrar information concerning that birth or death; or

(b) the entry is an entry of a birth which is signed by a person professing to be a Superintendent-Registrar, or which purports to have been made with the authority of the Registrar-General, or

(c) the entry is an entry of a death which purports to have been made upon a certificate from a Coroner or Magistrate; or

(d) the entry purports to have been made in pursuance of any written law relating to the registration of births and deaths at sea or on board an aircraft, or

(e) the entry is -

(i) an entry in any register, book of record or document recording particulars of births and deaths which has been kept or preserved under or in accordance with the provisions of any former written law relating to the registration of births and deaths; and

(ii) such entry or a certified copy of such entry would immediately before the coming into force of this Act have been received as evidence of the facts or particulars in respect of which such entry or certified copy is produced as evidence.

[174] It was put to us that under the Federal Constitution, Ninth Schedule, Federal List, item 4(e)(ii), the civil courts have no power to make laws in respect of Muslim personal law. That provision reads:

4. Civil and criminal law and procedure and the administration of justice, including –

(e) subject to paragraph (ii), the following:

(ii) the matters mentioned in paragraph (i) do not include Islamic personal law relating to marriage, divorce, guardianship, maintenance, adoption, **legitimacy**, family law, gifts or succession, testate and intestate; ... (emphasis added)

[175] This argument, as I have already said is misplaced for three reasons. Firstly, and aforementioned, if the argument is that the civil courts have no jurisdiction to determine matters relating to legitimacy, then by that token it would have to mean that the Federal Legislature has similarly no authority to make laws to that effect. The argument of the learned Senior Federal Counsel is self-defeating because by that argument, the appellants would have no jurisdiction to apply Islamic law in the process of registering the names of Muslim children. Instead, they would be bound to apply the secular civil law.

[176] Secondly, and more specifically, the purpose of the BDRA 1957 is to state the factum of parentage or more particularly in this case: paternity. The ascription of paternity or a surname by the scheme of the BDRA 1957 does not become proof of that fact. Thus, ascribing an illegitimate child his father's name with the father's permission has no effect of legitimising the child. Taking s. 4 of the Legitimacy Act 1961 as an example, the marriage of the mother and father of an illegitimate child does not automatically legitimise the child. The legitimation only happens with the effect of a court order granted under s. 5 of the same. Thus, the mere fact of recording the parentage of the child does not automatically render him legitimate.

[177] Arguably, the strongest argument here however is that s. 111 of the Johor Enactment 2003 legally denies paternity outright and not just the legitimacy of the illegitimate child. To me, this argument also has no legal basis. The registration of a person's paternity is a matter of fact. Presumptions of law are but legal fictions. It is something which courts are made to believe but not something necessarily grounded on facts or reality.

[178] There is no dispute that the jurisdiction of the Syariah Courts as circumscribed by Item 1 of the State List is to determine the legitimacy of a child in accordance with Islamic law. For clarity, the relevant part portions of that provision reads:

> 1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts ...

[179] The same item also demarcates the jurisdiction of the Syariah Courts which **"… shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph …"** (emphasis added)

[180] The respondents' argument before us is only to the extent of saying that it is not within the purview of the appellants to apply Islamic law in the registration of births of Muslim children. It is not to the extent of saying that the Syariah Courts do not have the jurisdiction to determine paternity. But to me, these arguments are inextricably linked. Item 1 of the State List only permits the Syariah Courts jurisdiction over matters relating to legitimacy and not paternity. And, I would think it wholly repugnant to the Federal Constitution and to logic to equate the two principles.

[181] Legitimacy is a matter of law and it is gauged on the basis of the birth of children *vis-a-vis* the status of their parents' marriage. Paternity is a question of fact and is something which is incapable of being changed by law. Even an adoption for instance, may remove all legal rights of a biological father or mother to the adoptive parents but that would not change the fact that the biological parents remain the child's biological parents.

[182] This leads me to the third and final of my three points.

[183] In my considered view, based on what I have stated earlier, the Federal Government, that is to say the appellants, have no jurisdiction to apply Islamic law as far as the registration of births and deaths in the context of item 12(a) of the Federal List is concerned. The registration of births and deaths is a subject matter falling exclusively within the Federal List without any necessary correlation to the State List. This, to me, is without prejudice to the legal concept of legitimacy.

[184] The legitimacy of Muslims is a subject-matter falling strictly within the jurisdiction of the State List. In this judgment, I do not make any determination on Islamic law. I am completely aware of the appellants' and the intervener's contention that legitimacy and paternity – as far as Islamic law is concerned – are inextricably linked concepts. On that observation, I make no comment.

[185] The appellants' submission and reliance on art. 3(1) of the Federal Constitution providing generally that Islam is the Federation the Religion is belied by the judgment of the Supreme Court in *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ 55.

[186] The argument there raised was that the death penalty was unconstitutional for being un-lslamic and the appellant being a Muslim, ought not to be subject to it. Salleh Abas LP's categorical answer to that argument (which is substantially the same as the appellants' arguments in the present appeal) was as follows (at p. 57):

> [W]e have to set aside our personal feelings because the law in this country is still what it is today, secular law, where morality not accepted by the law is not enjoying the status of law.

[187] The above passage ought to be read together with art. 3(4) of the Federal Constitution which further affirms the secular nature of our civil law.

[188] Thus, the simplicity of my view is that paternity and legitimacy are separate and distinct concepts and the mere registration of the father's surname does not render legitimate an otherwise illegitimate child. Having registered the second respondent as the father, I cannot find any rational justification in the provisions of the BDRA 1957 for the appellants to ascribe to him the surname "bin Abdullah" (or any other for that matter) over the patronymic surname "bin second respondent".

[189] The drafters of our Federal Constitution in their infinite wisdom purposely chose to draft it in such terms and such way so as to draw an express demarcation between the registration of births and deaths on the one side, and the determination of legitimacy on the other. In the result, the obvious conclusion is that the appellants were and are required to apply the provisions of the BDRA 1957 as it exists.

[190] Thus, in accordance with what I have stated at the outset of this judgment, the rule of law requires that the courts act as the ultimate bulwark against injustice and to apply the law as we find it. And finding the law as it is, the appellants' impugned decision is purely untenable and unsustainable in law.

Judicial Review Over Administrative Error

[191] The Court of Appeal, at para. [33] of its judgment reported at [2017] 7 CLJ 533; [2017] 4 MLJ 440 relied on the following *dictum* of the Gujarat High Court in *Nitaben Nareshbhai Patel v. State of Gujarat & Ors* [2008] 1 GLR 884 citing another Indian decision which stated as follows:

> Since the powers of the Registrar are wide enough to ensure that the entry made in the Register does not mislead or give an incorrect impression, it is his duty to ensure that suitable correction is made in the entry to ensure the authenticity of the Register by reflecting the correct state of affairs in the marginal entry that he is required to make. No direction can be issued by any authority to take away the powers of the Registrar of making correction in entries which are erroneous in form or substance in the Register. The Registrar, therefore, was not justified in referring to some guidelines and reading them so as to curtail his own powers under Section 15 of the Act. No guidelines can be issued against the statutory provisions empowering the Registrar to make corrections except by way of rules made by the Government with respect to the conditions on which and the circumstances in which such entries may be corrected or cancelled as provided in Section 15 itself. In our opinion, therefore, the learned single Judge was justified in setting aside the impugned order and directing the appellant Registrar to entertain the application of the respondent and effect the necessary correction in the register in accordance with the provisions of Section 15 of the Act.

[192] I find myself in complete agreement with the above observation and the Court of Appeal's reliance on the same. To reiterate, the power of any administrative body, being a creature of statute is dictated by positive law. See: *Ex Parte Fewings* [1995] 1 All ER 513. There was no legal basis for the appellants to refer to Islamic law and legal principles as they comprise Federal bodies established under Federal law, and whose powers are circumscribed by the Federal List. I therefore accept the respondents' argument that the appellants' reliance on the "bin Abdullah" convention was not countenanced by law and is an error which must be corrected.

[193] The Court of Appeal also noted that the operative words of s. 27(3) of the BDRA 1957 is 'may'. Decided case law have held that 'may' generally confers discretionary power. The question is whether it was open to the appellants to make the impugned decision to reject the respondents' s. 27(3) application to have the first respondent's surname corrected from "bin Abdullah" to the second respondent's name in patronymic form. The Court of Appeal then went on to note that s. 13A(2) of the BDRA 1957 grants the second respondent the ability to have his surname used in respect of his

illegitimate son, the first respondent. It further held that it was not within the power of the appellants to arbitrarily elect the surname "bin Abdullah" over "bin second respondent".

[194] I think the judgment of the Court of Appeal is entirely correct. While the word 'may' confers discretion, it is a cardinal principle of administrative law that discretion may not be absolute nor may it be applied or refused to be applied at the whims and fancies of the decision-maker. Discretion must be exercised in accordance with law leaving aside all irrelevant considerations while taking into account all relevant considerations. Having held that the ascription of the "bin Abdullah" surname was wholly unfounded in law, it is my view that appellants were only entitled to exercise their discretion in s. 27(3) discretion one way – that is – to correct the mistake as per the respondents' application.

Welfare Of The Child

[195] The final issue in respect of the substantive issue in this appeal relates to the order of the Court of Appeal ordering the removal of the endorsement in the birth certificate where it indicates that the registration of the particulars of the first respondent was done pursuant to s. 13 of the BDRA. This the respondents argue is discriminatory because it informs the entire world that the first respondent is an illegitimate child. They argue that this type of discrimination is not sanctioned by art. 8(1) of the Federal Constitution as it bears no legitimate nexus to the reason for the discrimination. The appellants argue that the discrimination is necessary because the relevant authorities, particularly the Islamic authorities, will have to know that the first respondent is illegitimate.

[196] This is what the Court of Appeal held in respect of this specific argument, at paras. [46]-[51]:

> In an oblique but obvious reference to the *fatwa*, the second respondent in his affidavit in reply that was produced at the hearing in the court below explained that the entry 'Permohonan Seksyen 13' in the first appellant's birth certificate was to assist the relevant agencies in dealing with the issues of inheritance, maintenance, perwalian, marriage, death, citizenship, lineage, land, *et cetera*. The purpose clearly was to alert the agencies to the fact that the first appellant is an illegitimate child (anak tak sah taraf).
>
> With due respect, that is not the second respondent's job under the BDRA. It is a wholly irrelevant consideration which must also have weighed heavily in the second respondent's mind when rejecting the second appellant's application to register his name as the first appellant's surname in the birth certificate.
>
> If at all, the purpose intended by the second respondent can in fact be achieved without the need to make the s. 13 entry in the first appellant's birth certificate, and that is by asking for the production of the second and third appellants' marriage certificate as well as the first appellant's birth certificate if and when there is a need to determine the first appellant's legitimacy, for example in a dispute over inheritance in the Syariah Court.

A We note that s. 13 of the BDRA merely sets out the procedure for the father to be registered as the father of the illegitimate child. It does not mandate the insertion of the s. 13 information on the birth certificate. Rule 7 of the Births and Deaths Registration Rules 1958 which was made pursuant to s. 39 of the BDRA only obligates the second respondent to issue the birth certificate in the prescribed Form JPN.LM05, without B making it mandatory to insert any information on the legitimacy of the child in the certificate. There is nothing in Form JPN.LM05 that requires the entry of the remark that the registration is a s. 13 registration.

It is therefore not a requirement of the law that the birth certificate of an illegitimate child must be endorsed with the s. 13 information. What the C second respondent did in the present case was something that the law did not require him to do. The irony is that he does not see the need (rightly so in our view) to make such entry in respect of a legitimate child.

No rational explanation has been given for the difference in treatment between a legitimate child and an illegitimate child. It is clear that the D practice of making the s. 13 entry in the birth certificate of an illegitimate Muslim child is for an extraneous purpose, without any regard for the best interest [*sic*] of the child.

[197] With respect, it is my considered view that the Court of Appeal was correct. Discrimination is allowed under art. 8(1) of the Federal Constitution E provided it meets the following two tests as distilled from the judgment of this court in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507; [2010] 2 MLJ 333 at para. 27 and those questions are as follows:

(i) is the classification founded on an intelligible differentia distinguishing between persons that are grouped together from others who are left out F of the group; and

(ii) does the differentia selected have a rational relation to the object sought to be achieved by the law in question?

[198] In addressing the second of the two questions, ie whether the differentia has a rational relation or reasonable nexus to the object sought to G be achieved by the law in question, I had recourse to article 3(1) of the United Nations Convention on the Rights of the Child ('UNCRC') which reads:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or H legislative bodies, the best interests of the child shall be a primary consideration.

[199] Also relevant is article 7 of the UNCRC which provides as follows:

The child shall be registered immediately after birth and shall have the I right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.

[200] Malaysia filed a reservation against article 7. That reservation reads: A

> The Government of Malaysia accepts the provisions of the Convention on the Rights of the Child but expresses reservations with respect to articles 1, 2, 7, 13, 14, 15, […], 28, [paragraph 1(a)] 37, […] of the Convention and declares **that the said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.** (emphasis added) B

[201] The Court of Appeal in the *CAS* case (*supra*) did consider the effect of article 7(1) of the UNCRC and that it was not expressly ratified through Malaysian domestic legislation. However, applying settled principles of construction relating to international law, it held that the spirit of article 7(1) C was applicable in Malaysia. Article 3(1) has only received partial ratification in the Child Act 2001 in respect of certain situations relating to children. I see no impediment in saying that the principle of paramountcy of the child's welfare – in this specific context, the right to bear a name – is in complete conformity with arts. 5 and 8 of the Federal Constitution. D

[202] The above international principles on the paramountcy of the welfare of the child conform entirely with our art. 8(1) of the Federal Constitution and suggest that there is no reasonable nexus or rational relation between the s. 13 endorsement and the object it seeks to achieve by informing the world at large that the first respondent is an illegitimate child. With respect, there E is therefore no conceivable reason why the status of an illegitimate child needs to be broadcasted to all and sundry.

[203] The birth certificate is, in practice, a significant document and features in many important dealings with the Government and private persons. It gives a person an identity in the eyes of the State and helps him admit himself F in school or to apply for a passport. In the context of lawyers for instance, the birth certificate is a necessary exhibit in petitions for one's call to the Bar. Is it necessary for anyone to know whether someone was born legitimate or not insofar as being called to the Bar is concerned? What about applications to enroll children in primary schools? Or, even for that matter, applications G for a driver's license when dealing with the Road Transport Department? These are but just some of many examples. What useful purpose does displaying one's illegitimate status serve? These are the questions we must ask in relation to art. 8(1) and the answer is obvious.

[204] It is my view that it will lead to serious and unjust repercussions to H any child's emotional well-being and future. It is patently clear that the child is not responsible for the circumstances he or she finds himself or herself in and when the law allows the child to bear such stigma, it is a law which does not have the best interest of the child. The best interest of children must be the primary concern in all laws, policies and decisions affecting them. Their I right to be known as a member of the family should not be taken away. This is not an emotional argument but a due recognition that such rights are constitutional rights.

[205] Thus, with respect, I think the Court of Appeal arrived at the correct conclusion by ordering the removal of the s. 13 endorsement. I not do propose to disturb that order.

Final Analysis

[206] At this juncture, I note that I have read the judgment in draft of my learned sister Rohana Yusuf FCJ (now the PCA) which has become the majority judgment of this court. With respect, for the reasons I have expressed in length in this judgment, I cannot agree with the conclusions the majority has arrived at and the orders they make.

[207] The majority judgment, with respect, may be summarised shortly as follows, along with my categorical response which ought to be read together with the rest of my judgment.

[208] Firstly, the majority posits that the dictionary definition of "surname" suggests that Malays do not have surnames as the term is commonly understood. "Surname" cannot include "patronymic surnames" because the evidence of experts suggests that Muslims and/or Malays do not have surnames. With respect, I disagree.

[209] It is trite law that experts cannot conclusively provide opinions on questions of law or decide them for the court. In a medical negligence case for example, an expert cannot simply tell the court that he thinks the defendant-doctor is negligent. That is a question of law. His views are only relevant to assist the court to ascertain the standard of care adopted by those in the profession and to decide as a matter of law whether the defendant's act or omission deviated from the accepted standard of care such that he breached his duty of care. It is the court, upon making the necessary finding of fact of the breach of standard to legally conclude that the defendant-doctor was legally negligent.

[210] This position of the law is well-entrenched in our law and in all common law jurisdictions. In *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561, this court held that legally suborning a High Court Judge to the opinion of assessors (which is not too dissimilar from leaving legal decisions to experts) is an unlawful usurpation of judicial power. On another note, GP Selvam J noted as follows in *H156* [1999] SLR 756, at p. 764:

> The function of an expert on foreign law is to submit the proposition of foreign law as fact for the consideration of the court. The court will then make its own finding of what the foreign law is. Even though the expert may submit his conclusions, he must present the materials and the grounds he uses to make those conclusions. *The expert may not usurp the function of the court and present his finding. Further he cannot decide the Issue by applying the law to the facts without setting out the law and reasoning process.* (emphasis added)

[211] The only recognisable exceptions to the above ie, where experts can usually help ascertain the law for judges is apparent in s. 45(1) of the Evidence Act 1950 as regards what 'foreign law' is. Next, 'law' is defined art. 160(2) generally to mean 'written law, common law and any custom or usage having the force of law'. Experts can also aid the court to determine whether any custom or usage has in fact achieved the status of law. This is because whether a custom or usage has become law, apart from it being enacted into written law, requires expert opinion. See generally for instance s. 13 of the Evidence Act 1950, and the dissenting judgment of Zainun Ali FCJ in *Director of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors and Other Appeals* [2017] 3 CLJ 1; [2017] 2 MLJ 281. This has been the position of our law for centuries even since the early colonial era.

[212] In this case, what constitutes "surname" in s. 13A of the BDRA 1957 is a question of law. In this regard, this court must apply the trite cannons of statutory interpretation. Applying the interpretation afforded earlier in this judgment, ie, the purposive rule and with the aim to avoid an absurd result, "surname" includes "patronymic surname" and hence, s. 13A applies to all persons in Malaysia regardless of their cultural or religious background until and unless Parliament amends the law to say otherwise. It is not the role of the courts to rely on expert evidence to generally tailor statutes to accord with local circumstances as doing so is to put the courts in the position of the Legislature.

[213] Secondly, the majority suggests that Islamic law promulgated by the State is applicable to the interpretation and enforcement of law promulgated by strictly under the Federal List. As alluded to earlier, strict Federal law is, in the basic structure of our Federal Constitution, secular. The basic structure does not condone the application of Islamic law in this sense. As such, because this court and the appellants are confined strictly to Federal law, they are not allowed to take into account Islamic law and hence, they are legally obligated to ascribe to the first respondent his full name which includes his patronymic surname.

Conclusion

[214] Based on the foregoing, I see no credible reason to depart from the decision and reasons of the Court of Appeal. In the premises, I dismiss this appeal and affirm all the orders of the Court of Appeal referenced at the outset of this judgment.

[215] As for the leave questions, based on the outcome of my decision, I think it is unnecessary to answer questions 1 and 2. My answer to question 3 is in the affirmative.

[216] As this is an appeal involving significant public interest, I make no order as to costs.

Nallini Pathmanathan FCJ (dissenting):

Introduction

[217] This appeal relates to the ambit of the powers exercisable by the Registrar-General of Births and Deaths under the provisions of the Births and Deaths Registration Act 1957 (Act 299), in relation to recording or registering the full name of a child who is illegitimate under the Muslim faith. More particularly, it turns on the record of paternity of such a child in the Register of Births and Deaths under the said Act.

[218] In ascertaining the scope of the Registrar-General's powers, it is necessary to construe specific provisions of the Births and Deaths Registration Act 1957 ('BDRA 1957) within the context of the entire Act. It is of primary importance to bear in mind that the BDRA 1957 was enacted pursuant to Federal powers as contained in the Ninth Schedule, List 1 – Federal List, item 12 of the Federal Constitution.

[219] It is important to clarify at the outset that this is not a case seeking to confer legitimacy on a Muslim child deemed to be born out of wedlock under Muslim personal law. The legitimacy of the child in the instant appeal is not in issue.

[220] This appeal stems from a judicial review application filed by the father, MEMK, and mother NAW, of a child ('the child'), who seek to quash the decision of the second appellant, the Registrar-General of Births and Deaths ('the Registrar-General') dated 6 March 2012. On that date, the Registrar-General, on behalf of the first appellant, the Jabatan Pendaftaran Negara ('the Registry of Births and Deaths') issued a birth certificate in respect of the child which bears the surname "Abdullah" rather than the father's name, "MEMK".

[221] The birth certificate was so issued despite the fact that the father's name, ie, MEMK had been registered as the child's father pursuant to s. 13 BDRA 1957. Put simply, the father's name was not ascribed to the child as his surname or patronymic name on the birth certificate.

[222] To echo the judgment of the Court of Appeal, the child's name as it presently appears on his birth certificate is "A child bin Abdullah" and not "A Child bin MEMK".

[223] The issue before the courts is simply whether the Registrar-General, whose powers are expressly set out in the BDRA 1957, acted within or outside the scope of his powers in registering the child's birth by recording his name as "A Child bin Abdullah" and not "A child bin MEMK", given that the name of the father was recorded at birth as MEMK.

The Majority Judgment

[224] The majority judgment has, in summary, reasoned and concluded *inter alia* that:

(i) Firstly, that "surname" as appearing in s. 13A of the BDRA 1957 does not apply to Muslims for two reasons. The dictionary definition of the term strictly confines its application to "last name" or "family name" which serve to indicate a common generational link among family members. Secondly, that "surname" cannot include "patronymic surname" because the evidence of experts adduced by the appellants confirms that Muslims in Malaysia do not have surnames. In this context, the majority concludes that Muslims and/or Malaysia in this country do not have surnames;

(ii) Secondly that the Islamic Family Law (State of Johor) Enactment 2003 ('Johor Enactment 2003') is applicable to the interpretation of the provisions of the BDRA 1957. The two *fatwas* issued by the National Fatwa Council ('NFC') however are not. This determination therefore provides that the Islamic personal law of Muslims is applicable to the interpretation of a Federal law; and

(iii) Thirdly, that in the present case, the wrong personal law was applied. Accordingly, it was ordered that the appellants' insertion of "bin Abdullah" be removed. The child is to be given or ascribed only his name without the name of the father. The net result is that his name will read simply "Child" and not "Child bin Abdullah", "Child bin MEMK" in accordance with the Johor Enactment 2003.

[225] I have read the majority judgment authored by my learned sister Rohana Yusuf, the President of the Court of Appeal, and with which my learned brothers, Azahar bin Mohamed CJM, Zawawi bin Salleh FCJ and Idrus bin Harun FCJ, concur. However, and with the greatest of respect, I am unable to agree with the reasoning and conclusions of my learned sister. I am therefore constrained to deliver this separate judgment.

[226] My learned brother Justice Abang Iskandar has read these grounds and concurs with the same. As Rohana Yusuf PCA has set out the facts exhaustively, I shall not do so again. Instead, I focus primarily on the questions of law I have identified below.

The Questions Of Law

[227] This appeal raises four fundamental questions necessitating constitutional and statutory interpretation:

(i) Is s. 13A of the Births and Deaths Registration Act 1957 ('BRDA 1957') inapplicable to Malays and/or Muslims;

(ii) Is legislation enacted in respect of matters falling within the Federal List, such as the BDRA 1957, to be construed by reference to, or by incorporation of, Enactments or Ordinances enacted under the State List, such as the personal law relating to Muslims in relation to legitimacy?

(iii) Were the appellants correct in law, on the facts of this case, to ascribe the surname 'bin Abdullah' to the child;

and

(iv) If the appellants acted outside the scope of their jurisdiction under the BDRA 1957, should this court order that the child be ascribed his father's name, MEMK on the birth certificate? Or should the birth certificate bear only the child's name?

Whether s. 13A Of The Births And Deaths Registration Act 1957 Is Inapplicable To Malays And/Or Muslims

[228] It is an undisputed fact in this case that the child is, under the Islamic law of Johor, an illegitimate child. Before proceeding to ascertain the application of s. 13A of the BDRA 1957, it would be pertinent to first examine the general rule in relation to the registration of births of children. The primary sections applicable in respect of legitimate children are ss. 4 and 7 of the BDRA.

[229] Section 4 generally provides that the Registrar-General shall be required to register all births and deaths occurring in this country. It then goes on stipulate the general powers of the Registrar in respect of such obligations. Section 7 provides that the Registrar is to record such particulars as may be prescribed. Section 7(2) specifically indicates who exactly is to provide information in respect of a birth, such as the mother or the father.

[230] The specific prescription of particulars is governed by the Births and Deaths Registration Rules 1958 ('BDRR 1958') which have since been repealed and replaced by the Births and Deaths Registration Rules 2019 ('BDRR 2019'). But, for the purposes of this case, the BDRR 1958 apply.

[231] Rule 3 of the BDRR 1958 states that the information to be given concerning the birth of every child born in the Federation and the particulars to be entered in the register concerning such birth or still-birth shall be as set out in Form JPN.LM01, in the First Schedule. Form JPN.LM01 is a lengthy form requiring – among other things – under the header "Maklumat Kanak-Kanak": "Nama". This translates to "Information relating to the Child": "Name".

[232] The BDRA 1957 draws no distinction between Muslim and non-Muslim children. The only two blanket exceptions applicable in respect of the registration of childbirths are contained in ss. 13 and 13A which stipulate the birth registration details in respect of illegitimate children.

[233] Section 13 of the BDRA 1957 provides:

> **Provisions as to father of illegitimate child**
>
> 13. Notwithstanding anything in the foregoing provisions of this Act, in the case of an illegitimate child, no person shall as father of the child be required to give information concerning the birth of the child, and the Registrar shall not enter in the register the name of any person as father

> of the child except at the joint request of the mother and the person acknowledging himself to be the father of the child, and that person shall in that case sign the register together with the mother.

[234] Section 13 is accordingly the first exception to s. 7(2) of the BDRA 1957 in that the purported father of a child need not provide information of the birth of such child unless such person acknowledging himself to be the father jointly requests with the mother to do so.

[235] On the facts of this case, both parents of the child, MEMK and NAW, entered a joint request to register MEMK as the father and this request was essentially approved. As matters stand, the child's birth certification identifies MEMK as his father. Paternity is therefore neither unknown or disputed.

[236] The second exception is contained in s. 13A(2) of the BDRA 1957 which stipulates as follows:

> **Surname of child**
>
> **13A.**
>
> …
>
> (2) The surname, if any, to be entered in respect of an illegitimate child may where the mother is the informant and volunteers the information, be the surname of the mother; provided that where the person acknowledging himself to be the father of the child in accordance with section 13 requests so, the surname may be the surname of that person.

[237] Despite having registered MEMK as the child's father, the appellants ascribed the latter the surname "bin Abdullah". The bulk of the parties' contentions rest on the word "surname".

Surname

[238] "Surname" as utilised in the BDRA is not defined. Neither is it defined in the Interpretation Acts 1948 and 1967. Turning to the usage of the term in ordinary English, the *Oxford's Advanced Learner's Dictionary* (7th edn), at p. 1545 defines "surname" as follows:

> a name shared by all the members of a family (written last in English names)

[239] The appellants take the position that s. 13A of the BDRA 1957 is inapplicable to the present case because MEMK's name when affixed to the child's name after 'bin', (which translates to 'son of' in Arabic) is not a surname. They maintain that MEMK is merely the personal name of the person acknowledging himself to be the father. The intervener takes a similar position.

[240] In response, the respondents submit that "surname" ought to include "patronymic surnames". They respond that in a multi-religious and multi-racial Malaysia, with diverse naming practices, the meaning of the word "surname" must necessarily be interpreted purposively to encompass

patronymic names. To put it simply, the term surname ought to be construed purposively so as to include the name of a father of a child, so that paternity is evident on the face of the birth certificate. A child's name would therefore include the child's given name and that of the father, as is the convention presently. As such the term 'surname' comprises not only the strict Oxford English dictionary definition of surname, but would encompass the name of the father of a child in cultures that do not practice nor adopt the English form of surname.

[241] Otherwise, Muslims without typical surnames, certain Indian or Sri Lankan ethnic groups, natives of Sabah and Sarawak and many others would be excluded from the application of s. 13A of the BDRA 1957.

[242] The appellants submitted expert evidence to explain that certain races in Malaysia do not have surnames. With respect, it is a well-accepted principle of law that the opinion of experts is confined to the facts of a case, and they cannot purport to draw legal inferences or provide their subjective view of a particular matter. More so when such opinion purports to provide a specific definition of a term utilised in specific legislation for a specific purpose. See: *Ong Chan Tow v. Regina* [1963] 1 LNS 88; [1963] 1 MLJ 160, at p. 162.

[243] In the present case, the meaning of "surname" is a question of law because it requires statutory interpretation. Thus, the view of experts on the subject is, with respect, entirely irrelevant. None of the experts was, in any event, presenting an opinion in relation to the statutory interpretation of "surname" in the context of the BDRA 1957.

[244] This is important because it must be borne in mind that the BDRA is essentially a repository of facts and statistics in relation to the births and deaths of persons in Malaysia. It is enacted pursuant to item 12, of the Federal List in the Ninth Schedule, which item relates to census and statistics in the nation. It is applicable to all persons in the country, regardless of race and religion. No differentiation is made in the applicability of the provisions of the BDRA 1957 to the various races who comprise the citizens of this plural population comprising Malaysia.

[245] Neither does the Act relate to, provide for, or prescribe stipulations in relation to legitimacy, naming conventions, cultural practices or religious law. In other words, it is an entirely secular Act.

[246] It is also pertinent that the experts did not address the issue of whether 'surname' would include patronymic surnames, particularly in the context of the BDRA 1957. The purpose of the BDRA is to provide a full repository or register of births within the country. An essential feature of that register is that the identity of the mother and father, meaning the biological mother and father, is recorded. This affords a child an identity.

[247] In the context of the child, the paternity of the father is certainly not in issue. It follows that for the purposes of registering his birth and identification of his biological parents, the child ought to be ascribed the name of his biological father as that is a fact that is not in dispute. It accords him a full name and identity. A child born in this country relies on that identity to enjoy basic human rights such as an education and other benefits that accrue to citizens of Malaysia.

[248] Ultimately, the issue of how the term "surname" is to be interpreted must be one of statutory interpretation. The primary rule is the literal rule which envisages that the term 'surname' in s. 13A is to be given its ordinary and natural meaning, but within the context of the BDRA 1957. This means that the word 'surname' cannot be construed *in vacuo* or without regard to the surrounding words, context and most significantly, the purpose or objective of the Act.

[249] Courts must interpret legislation according to the clear wording of the statute, and in keeping with its context. Even if it is suggested that 'surname' in s. 13A is ambiguous, the exercise of statutory construction does not end there. It remains incumbent upon the courts to undertake the task of construing the section, adopting a purposive approach. It is beyond dispute that the courts are tasked to give meaning to legislation in accordance with its object, purpose and prevailing legislative intent.

[250] Applying the purposive approach, it follows that the object of s. 13A is to enable or facilitate the entry of a father's name where a child is illegitimate. It allows paternity to be established for an illegitimate child where the father acknowledges paternity, and seeks and consents to have his name specified as the child's surname. In short, the section allows for a formal acknowledgment of paternity, for purposes of record in the Register of Births.

[251] Paternity provides information in relation to the identity of the biological father of a child. The BDRA 1957 is enacted to provide for a census of all citizens through a system of registration of births and deaths nationwide. As such is its object, the application of a purposive approach to statutory construction would yield the result that the term 'surname' in s. 13A ought to be construed as referring to both a patronymic name as well as the English *Oxford Dictionary* meaning of the word.

[252] The word "patronymic" according to the *Oxford Dictionary* (*supra*) at p. 1111 is defined as follows:

> a name formed from the name of your father or a male ancestor, especially by adding something to the beginning or the end of their name

[253] The expert opinions relied upon in the majority judgment might well provide in essence that Malays have no surnames as understood in the traditional English language and culture sense. However, it does not thereby follow that s. 13A of the BDRA 1957 therefore becomes inapplicable to an

entire segment of society or citizens in the nation. The more logical and reasonable conclusion which accords with a purposive approach to statutory interpretation would be to construe 'surname' in the context of the object of the Act, so as to mean the name of the father. After all, the purpose of s. 13A is to enable an illegitimate child to have the name of his father added to his name so that the identity of the biological father is expressly stated.

[254] The attendant question that arises for consideration is whether the BDRA 1957, which is a federal civil law applicable to all persons/citizens of the nation, can be construed such that one section only in the entire Act, namely s. 13A, is inapplicable to a particular section of citizens, by reason of the use of the word 'surname'. And can it be so, particularly where Parliament has made no such provision, expressly or impliedly? In the absence of any such stipulation by Parliament in the statute or the section, is it open to the courts to arrive at such a divergent conclusion? I am unable to conclude, with respect, that such was the intention of Parliament. Such a construction gives rise to a result that is not tenable. It strains the language and purpose of s. 13A and the statute as a whole.

[255] In other words it cannot simply be concluded that in view of the word used in the section, namely 'surname', the entire section ie, 13A becomes inapplicable to a particular segment of the population. This is particularly so, given that such a conclusion leads to the inapplicability of the entire section to the majority of the population of Malaysia, in respect of an Act that has application, as promulgated by Parliament, to all citizens of the country. It is pertinent in this context that many other races within the country also do not have "surnames" in the traditional sense used in Western culture. This would include, for example Indians and Kadazans to name a few.

[256] The consequence of attributing a literal dictionary meaning to the term "surname" in the BDRA 1957 would be to render the section ineffectual. When construed literally the section would have no effect in respect of all persons who do not have a family name or surname.

[257] In direct contrast, attributing a construction to surname which includes a patronymic surname, immediately affords the section relevance, as it is then applicable to all segments of the populace, regardless of race, culture and social convention. As such the application of a purposive approach, whereby the term 'surname' is construed as including a 'patronymic surname' affords greater rationality and lucidity to the section and Act as a whole. The courts are bound to construe legislation in such a way as to avoid an absurd result. See for example: *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145; [2018] 1 MLJ 545, at para. 76.

[258] In other words, to conclude that s. 13A is inapplicable to Malays and/or Muslims on the grounds that they do not possess surnames, would amount, in my view, to going against the express purpose set out in s. 13A, namely to afford a child born out of wedlock the right to have his father's

name specified on his birth certificate. This would run awry of the textual meaning to be accorded to 'surname' in that section. Significantly, it would preclude such persons, *albeit* non-Muslims, from utilising s. 13A too.

[259] It might be argued that the use of the words "if any" in s. 13A(2) suggests that Parliament envisioned not all persons having surnames, even if that includes patronymic surnames. With respect, I disagree. Form JPM.LM01 prescribed either under the BDRR 1958 or the BDRR 2019 makes no specific allocation for surnames in spite of the s. 13A. The Form only provides for "Nama" or "Nama Penuh" under the "Maklumat Kanak-Kanak" header. Reading the Form with s. 13A therefore suggests that a surname proper or a patronymic surname, constitutes a part of the child's name or full name.

[260] In summary, stating that Malays and/or Muslims do not have surnames is to render s. 13A and even s. 13 of the BDRA 1957 otiose. It suggests that Parliament only intended for such a provision relating to the "full name" of children to apply to a specific category of Malaysians who have surnames as the term is traditionally understood. Such a construction would lead to the exclusion of a vast majority of the Malaysian populace.

[261] An interpretation along those restricted lines of "surname" to exclude "patronymic surnames", on the assumption that Muslims do not generally have surnames, also has, as stated above, the effect of excluding all other persons who are not Muslims and do not have surnames. Indeed, many races such as Malaysians of Indian descent or from Sabah and Sarawak do not have traditional surnames and indeed rely on patronymic surnames. Thus, such a constrained reading, in my respectful view, would bring about an incongruous result.

[262] For the foregoing reasons, as the BDRA 1957 makes no distinction in its application between Muslims or non-Muslims, and until and unless Parliament amends the law to this effect, it is my view that ss. 13 and 13A apply to apply to all persons. Thus, it is my considered view that the appellants were under the legal obligation to ascribe to the child the name 'Child bin MEMK' representing the MEMK's personal name as a patronymic surname.

Whether The Personal Law Of Muslims As Enacted Under The State List Applies To The BDRA 1957

[263] From my understanding, to resist the argument that the BDRA 1957 applies to all Malaysians regardless of their racial, religious or cultural identity, the appellants and the intervener argue that Islamic law, particularly personal law relating to the ascription of paternity and legitimacy, should be construed in conjunction with, and applied to the BDRA 1957's naming convention, with respect to Muslims only. In short, it is suggested that the personal law of Muslims under the State List be utilised or read in conjunction with the BDRA in order to construe it and in its application to Muslims.

[264] In the context of Johor, s. 111 of the Islamic Family Law (State of Johor) Enactment 2003 ('Johor Enactment 2003') provides:

> Where a child is born to a woman who is married to a man more than six *qamariah* months from the date of the marriage or within four *qamariah* years after dissolution of the marriage either by the death of the man or by divorce, and the woman not having remarried, the nasab or paternity of the child is established in the man, but the man may, by way of *li'an* or imprecation, disavow or disclaim the child before the Court.

[265] The appellants' and intervener's argument here is that the above provision, which relates to the ascription of paternity under Muslim personal law only, ought to apply to the child in the context of registration of birth naming details under the BDRA 1957 which is Federal law. The general argument appears to be that the BDRA 1957 should be read together with the Johor Enactment 2003. The larger and less tenable proposition appears to be the assertion that State promulgated law, in this case Islamic law, may be applied to qualify laws promulgated strictly under the purview of the Federal List.

[266] The starting point for this discussion is art. 74(1), (2) and (3) of the Federal Constitution which stipulate as follows:

> **Subject matter of federal and State laws**
>
> 74(1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).
>
> (2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.
>
> (3) The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.

[267] The above provisions clearly stipulate that the legislative powers respectively of the Federal and State Legislatures are mutually exclusive save for the Concurrent List. One cannot make laws within the purview of the other unless expressly authorised by the conditions stipulated in the Federal Constitution. The power of the States to enact laws relating to the Islamic religion is expressly circumscribed by item 1, State List, Ninth Schedule of the Federal Constitution. This quite plainly means that any law promulgated by the States in relation to Islamic personal law applies only in that State. Such has been the structure and demarcation of the powers of the Federation and the individual States since Independence Day.

[268] An example of the demarcation may be gleaned from the majority decision of the Federal Court in *Mamat Daud & Ors v. The Government of Malaysia & Ors* [1988] 1 CLJ 11; [1988] 1 CLJ (Rep) 197; [1988] 1 MLJ 119. The argument in that case was that though s. 298A of the Penal Code was promulgated for "public order" to prevent among other things, disunity between persons professing the same religion, it was in pith and substance a law relating to religion. It was therefore argued that s. 298A of the Penal Code was colourable and thus unconstitutional as Federal law dealing with matters within the exclusive purview of the State List. The Supreme Court accepted the argument and effectively struck down s. 298A of the Penal Code. This is what Azmi SCJ observed (with whom Seah SCJ J concurred), at p. 204 (CLJ); p. 126 (MLJ):

> Having considered and examined the provisions of section 298A as a whole, we rule that it is a colourable legislation in that it pretends to be a legislation on "public order" when in pith and substance it is a law on the subject of religion with respect to which only the states have power to legislate under Articles 74 and 77 of the Constitution.

[269] The issue in that case concerned a Federal law disguised as a matter falling strictly within the purview of the State Legislatures. The court accordingly struck down that provision. Equally the converse should yield the same result. That is, matters which fall within the exclusive purview of the State List have no impact and bearing on matters which fall strictly within the exclusive purview of Parliament – the Federal Legislature.

[270] The strict federality of the BDRA 1957 as referenced earlier, is borne out by item 12(a) of the Federal Constitution, Ninth Schedule, List 1 ('Federal List') provides as follows:

> 12. Surveys, inquiries and research, including -
>
> (a) census; registration of births and deaths; registration of marriages; registration of adoptions other than adoptions under Islamic law or Malay custom; …

[271] In this context, item 3(e) of the Federal List is also germane and again reaffirms that the registration of births and deaths is strictly a Federal matter.

[272] Further a perusal of the long title of the BDRA 1957 reveals that it was made under the auspices of item 12(a). The BDRA 1957 is therefore, for all intents and purposes, a Federal law dealing with subject matter that falls within the Federal List namely, registration of births and deaths. The power of Parliament to enact the BDRA 1957 is strictly a Federal legislative power over which the State-legislated law can have no bearing.

[273] The appellants argue that the Johor Enactment 2003 and Islamic law generally can apply to the registration of births by virtue of art. 3(1) of the Federal Constitution and the judgments of our apex court in *Kamariah Ali*

lwn. Kerajaan Negeri Kelantan, Malaysia Dan Rayuan Yang Lain [2002] 3 CLJ 766; [2002] 3 MLJ 657 and *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Yang Lain* [2007] 3 CLJ 557; [2007] 4 MLJ 585. However this contention is flawed as no cognisance has been taken of art. 3(4) of the Federal Constitution. Article 3(1) and (4) provide:

Religion of the Federation

3(1) Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.

…

(4) Nothing in this Article derogates from any other provision of this Constitution.

[274] Clause (4) is significant because it clearly means that the overarching provisions of art. 74, which demarcates the powers of the Federal and State Legislatures, continue to apply. Thus, Islamic law has no application insofar as the registration of deaths and births is concerned.

[275] The structure of the Federal Constitution in the present context is such that a clear divide is maintained between civil law, which is intrinsically secular in nature and applicable to all citizens on the one hand, and Muslim personal law on the other, which is confined to State Legislation promulgated in accordance with the State List and applicable only to Muslims. This clear demarcation between the Federal and State legislatures is an essential or intrinsic feature of the Federal Constitution, and ought not to be violated or transgressed. To assimilate or import State law or List II matters in the construction, implementation or application of Federal law would be to violate the internal architecture of the carefully constructed and circumscribed structure of the Federal Constitution. I therefore conclude that the contents of the Johor State Enactment cannot be imported and applied in the construction of Federal law, namely the BDRA 1957. To do so would be to conflate Federal law and State law. It would also conflate the concepts of paternity and legitimacy, which are differently treated under these separate "regimes".

[276] Most importantly there can be no intrusion or violence done to Islam or the ascription of paternity under Muslim personal law because that is preserved and practiced as expressly set out in the Johor State Enactment.

[277] This separate treatment of the civil law and Muslim personal law which arises from the clear demarcation of Federal and State law, is in keeping with the rule of law as applicable in Malaysia, a plural society, which enjoys a dual system of law. The genius of the structure of the Federal Constitution lies in its bifurcated system which embraces and encapsulates both secular and religious laws in its unique structure.

[278] The appellants' and intervener's argument that State-promulgated Islamic law can qualify secular Federal law is sufficiently answered by the judgment of the Supreme Court in *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ 55. The appellant in that case argued that the death penalty imposed on him was unconstitutional and un-Islamic. The death penalty is a federally promulgated law and is therefore not subject to Islamic law much like the case of the BDRA 1957. In addressing the argument, I can do no better than cite the observations of Salleh Abas LP, at p. 57 (and which apply squarely to this case):

> It is the contention of Mr. Ramdas Tikamdas that because Islam is the religion of the Federation, the law passed by Parliament must be imbued with Islamic and religious principles and Mr. Mura Raju, in addition, submitted that, because Syariah law is the existing law at the time of Merdeka, any law of general application in this country must conform to Syariah law.
>
> Needless to say that this submission, in our view, will be contrary to the constitutional and legal history … There is of course no need for us to go further than to say that the standard of justice naturally varies from individual to individual; but the only yardstick that the court will have to accept, apart from our personal feelings, is the law that was legislated by Parliament …
>
> [W]e have to set aside our personal feelings because the law in this country is still what it is today, secular law, where morality not accepted by the law is not enjoying the status of law. Perhaps that argument should be addressed at other forums or at seminars and, perhaps, to politicians and Parliament. Until the law and the system is changed, we have no choice but to proceed as we are doing today.

[279] It has not escaped my attention that the appellants also argue that under Islamic law, paternity and legitimacy are interrelated concepts. However, with respect, the source of this legal rule, in Johor, is s. 111 of the Johor Enactment 2003. As has been explained at length above, by virtue of the Federal Constitution, this State enactment does not apply to the registration of births and deaths, which is governed solely by federally promulgated law – the BDRA 1957.

[280] The appellants, the intervener and the *amicus* argued that the non-ascription of paternity in the birth certificate is a crucial factor to determine the status of the legitimacy of a person before the Syariah Court. With respect, this argument is somewhat misplaced. In the first place, the function of the births and deaths register is to record facts relevant to the birth. The Register does not however, purport to conclusively establish the truth of the contents of a birth certificate. (See: s. 33 of the BDRA 1957).

[281] As such, if the legitimacy of a person is in issue before the Syariah Courts, it is for the person alleging that the other is illegitimate to prove that fact. Such a fact is capable of proof by simple arithmetic, namely by calculating the difference in months or days between the birth of the person and the date of marriage of his parents.

[282] Further, the Court of Appeal had occasion in *CAS v. MPPL & Anor* [2019] 2 CLJ 454 to hold that paternity is a question of fact while legitimacy is a question of law. That judgment was affirmed on appeal to this court in *MPPL v Anor v CAS* (02(f)-14-03-2018(W) – 29 January 2019). This further cements the proposition that the disputed legitimacy of a person will have to be proved through concrete evidence, such as DNA samples, and not from a birth certificate.

[283] Section 111 of the Johor Enactment relates to the legal status of paternity. Thus, even if the birth certificate affirmatively describes someone as the father, it is still open to him to legally deny paternity and thus legitimacy in accordance with their Islamic personal law. In other words, while the Register might recognise him as the father, Islamic personal law might not. It thus remains open to such person or even the other parent to deny any parental responsibility such as maintenance and guardianship, as the case may be. Viewed from this angle, it further belies the argument that Islamic family law applies in the context of the registration of births.

[284] Finally, the appellants argued, and the Court of Appeal also addressed the validity of the two *fatwas* issued by the National Fatwa Council ('NFC'). The NFC is a federal body and its *fatwas* therefore do not have the force of law. I accept the argument that the appellants and respondents appeared to agree on, that if the NFC's *fatwas* are gazetted by the relevant State, then it applies as part of that State's law. However, the NFC's *fatwas* in this case have not been gazetted in Johor and even if they were, thereby becoming State law, that would, in any case, have no effect insofar as the interpretation and application of the BDRA 1957 is concerned. This is because, as explained, the intrinsic structure of the Federal Constitution renders all Federal law promulgated for general Federal purposes secular. Islamic law can only be enacted by the State and have effect in that State over matters in respect of which it has jurisdiction.

[285] Based on the foregoing, it is my considered view that the appellants acted *ultra vires* the BDRA 1957 by referring to external sources of law when exercising their powers of registration under that law, which the Federal Constitution and the BDRA 1957 do not otherwise permit them to do.

Were the appellants correct in law, on the facts of this case, to ascribe the surname 'bin Abdullah' to the child A

And

If the appellants acted outside the scope of their jurisdiction under the BDRA 1957, should this court order that the child be ascribed his father's name, MEMK on the birth certificate? Or should the birth certificate bear only the child's name B

[286] Premised on the above reasoning, the appellants were not entitled to ascribe the name 'bin Abdullah' to the first respondent. Illegality, irrationality and procedural impropriety generally constitute well-accepted grounds for judicial review. Without referencing any of the three principles C directly, it is beyond doubt, settled law that administrative bodies, being creatures of statute, only have such powers conferred on them by law. Should authority be needed for this, I find significant support in the judgment of Raja Azlan Shah Ag. CJ (Malaya) in *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ D 135, at p. 148. See generally also: *Ex Parte Fewings* [1995] 1 All ER 513.

[287] The principle was more recently restated in *Indira Gandhi* (*supra*). There, the question was whether the decision of the Registrar of Muallafs of Perak was correct in law in allowing the conversion of children without the benefit of consent from both their parents. This court held that the decision E was null and void and struck it down. The Registrar's act was an administrative act. As it was unlawfully exercised, it had to be set aside. The principle is the same in this case. I refer to the unanimous judgment of this court mirrored in the words of Zainun Ali FCJ as follows (at para. [118] (CLJ); para. [124] (MLJ)): F

> Thus it is clear to us that the boundaries of the exercise of powers conferred by legislation is solely for the determination by the courts. If an exercise of power under a statute exceeds the four corners of that statute, it would be *ultra vires* and a court of law must be able to hold it as such …

G

[288] The court below noted that the operative words of s. 27(3) of the BDRA 1957 is 'may'. Decided case law has held that the word 'may' generally confers discretionary power. Such power is not absolute and cannot be exercised arbitrarily according to the subjective opinion of the decision maker or by reference to materials outside of the four corners of the relevant H statute governing the exercise of such power. This principle is applicable to the Registrar-General of Births and Deaths, who was undertaking, at all times, an administrative function within the purview of the BDRA 1957. He was not acting as an adjudicator. To that extent, his discretion was circumscribed to matters within the Act.

I

[289] The question is whether it was open to the appellants to make the impugned decision to reject the respondents' s. 27(3) application to have the first respondent's surname corrected from "bin Abdullah" to the second respondent's name in patronymic form. The Court of Appeal noted that s. 13A(2) of the BDRA 1957 permits MEMK to have his surname used in respect of his illegitimate son, the child. It further held that it was not within the power of the appellants to arbitrarily elect the surname "bin Abdullah" over "bin MEMK". Based on the foregoing, and the well-settled principles of administrative law, the judgment of the Court of Appeal is, with respect, correct.

[290] Administrative law's emphasis on the objective exercise of discretion is supported by another principle of law, namely that the decision-maker must not take into account irrelevant considerations and only consider relevant considerations. The ascription of 'bin Abdullah' is not countenanced by the BDRA 1957. The appellants were therefore duty-bound by virtue of s. 27(3) of the Act, upon the application of the parents, to rectify the mistake they made in ascribing the name 'bin Abdullah' to the child.

[291] To do otherwise would amount to the Registrar-General taking on a function that has not been conferred upon him under the Act. Neither has he been conferred with powers as an adjudicator with the ability to adjudge on the best option to be adopted in relation to the naming convention of a child, be it in relation to religion, culture or otherwise.

[292] With respect, and notwithstanding counsel for the respondents' concession, I do not think that making an order to include only the first respondent's name without including the second respondent's name is legally tenable. For one, practice and even Form JPM.LM01 suggests that the child is to enjoy the benefit of his full name. There is no legal authority to suggest that the patronymic surname 'bin Abdullah' is correct just as there is no authority to suggest that only the first respondent's name alone should be reflected. To ascribe to him only his name without his father's name as his full name amount to an implicit recognition that State-promulgated Islamic law declaring him illegitimate applies.

[293] If the present appeal was any other case involving a legitimate child, the appellants would have followed the typical naming convention applied to all Muslim children in this country. That convention should not change on the facts of this case. This is so given that the requirements of s. 13A of the BDRA 1957 have been met, and as Muslim personal law relating to paternity and legitimacy is not applicable to the BDRA 1957, which is Federal law.

Conclusion

[294] For completeness and based on the foregoing, I accordingly answer the three leave questions as posed, as follows:

(i) Whether in performing the registration of births of Muslim children, the Register of Births and Deaths may refer to and rely on sources of Islamic law on legitimacy?

Answer: Negative.

(ii) Whether the civil court may determine questions or matters on the legitimacy of Muslim children in respect of naming and ascription of paternity?

Answer: Negative. Based on the above reasoning, this is a matter exclusively for the Syariah Courts to decide. That said, the birth certificate is not conclusive proof of the paternity or legitimacy of a person and the incorrect application of the BDRA 1957 is amenable to judicial review by the civil courts.

(iii) Whether s. 13A of Act 299 (the BDRA 1957) applies to the registration of births of Muslim children enabling the children to be named with the personal name of a person acknowledging to be the father of the children?

Answer: Affirmative.

[295] I have carefully read and considered the unanimous judgment of the Court of Appeal. I am satisfied that the Court of Appeal took into account the correct legal principles as set out above, arrived at the correct conclusions, and made the correct orders. I therefore dismiss this appeal in its entirety with no order as to costs. I affirm the decision of the Court of Appeal.